

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

NATALIE REESER,

Plaintiff,

HONORABLE GEORGE CARAM STEEH

v.

No. 14-11916

HENRY FORD HEALTH SYSTEM d/b/a  
HENRY FORD HOSPITAL,

Defendant.

MOTION HEARING

Thursday, April 21, 2016

- - -

APPEARANCES:

For the Plaintiff:

ADAM C. GRAHAM, ESQ.

For the Defendant:

TERRENCE J. MIGLIO, ESQ.  
BARBARA E. BUCHANAN, ESQ.

- - -

*To Obtain Certified Transcript, Contact:*  
*Ronald A. DiBartolomeo, Official Court Reporter*  
*Theodore Levin United States Courthouse*  
*231 West Lafayette Boulevard, Room 238*  
*Detroit, Michigan 48226*  
*(313) 962-1234*

*Proceedings recorded by mechanical stenography.*  
*Transcript produced by computer-aided transcription.*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I N D E X

Page

Motion hearing

3

E X H B I T S

Identification

Offered

Received

N O N E

Detroit, Michigan

Thursday, April 21, 2016

- - -

**THE CLERK:** Case Number 14-11916, Reeser  
versus Henry Ford Health System.

**THE COURT:** Good morning.

**MR. MIGLIO:** Good morning.

**MR. GRAHAM:** Good morning.

**THE COURT:** Would you like to state your  
appearances?

**MR. GRAHAM:** Adam Graham for Natalie Reeser.

**MR. MIGLIO:** Terrence Miglio on behalf of  
Henry Ford Health System.

**MS. BUCHANAN:** Barbara Buchanan also on  
behalf of Henry Ford Health System.

**THE COURT:** All right. I guess we'll deal  
with the plaintiff's motions first.

**MR. GRAHAM:** Your Honor, would it be all  
right to argue from here? I have a lot of materials. I'm  
happy to go up to the podium if you would like.

**THE COURT:** It would help if you come to the  
podium.

**MR. GRAHAM:** All right. So as I'm sure as  
your Honor has seen, there are six distinct issues that we

1 are attempting to prevent from being introduced at trial,  
2 and I will go through them in the order that they are  
3 presented in our motion, and I'm going to try to break  
4 them down as we got in the response. There were some  
5 additional arguments that we didn't expect, but we will  
6 try to address as much as we can, and if there are other  
7 issues, of course, if you have questions, I will be happy  
8 to answer.

9 So the first issue that we present is eliminating  
10 speaking about Ms. Reeser's sexual assault, and from our  
11 perspective it's difficult to see the relevancy of this  
12 particular event, and I want to clear up a couple of  
13 different things which have been stated in the motions.

14 The first is Ms. Reeser acknowledged somewhere in  
15 her deposition that this is an event which is still  
16 causing her to seek treatment to this day. I think that  
17 defense counsel cites a page in her deposition in the  
18 response. If you turn to that page, there's nothing on  
19 that page which would indicate that Ms. Reeser, in fact,  
20 had stated that she was still suffering from this  
21 condition, which required treatment.

22 **THE COURT:** What do we know about the sexual  
23 assault? Was there a prosecution? Did -- was it somebody  
24 at work? What was the story?

25 **MR. GRAHAM:** Sure. So Ms. Reeser was

1 sexually assaulted approximately in the year 2000. She  
2 was in a situation where there was one assailant, but  
3 there were three individuals involved. During the event,  
4 she had encountered an individual online, and this  
5 individual with two other individuals went to her father's  
6 home where she was staying at the time.

7 During the event, the two other individuals held  
8 Ms. Reeser down while she was sexually assaulted. After  
9 she was -- during this process, she was hit in the head  
10 and she was stabbed, and it is her belief that she was hit  
11 in the head with a brick. There is a question I think as  
12 to perhaps, you know, was it the wall, was it a brick in  
13 terms of where she was hit.

14 Afterwards, she did contact law enforcement, and  
15 she discussed the issue. She does not recall much of this  
16 conversation. In fact, she doesn't recall at all speaking  
17 with police. Part of that is due to the fact that she was  
18 went through a traumatic event, and part of it is because  
19 of the head injury as a result of the assault.

20 So Ms. Reeser has dealt with this issue for  
21 awhile. It was something that was traumatic in her life,  
22 which is understandable, but it is now 16 years later,  
23 and--

24 **THE COURT:** So there was a report to law  
25 enforcement by her. She recalls that she made a complaint

1 to law enforcement, but law enforcement didn't investigate  
2 or prosecute or what?

3 **MR. GRAHAM:** She recalls that her and her  
4 father -- after the event happened, she spoke with her  
5 father about the event. Eventually she went to the  
6 hospital to be treated. She recalls that there is a  
7 police report, but she does not remember speaking to the  
8 officer involved.

9 In terms of prosecution of the individuals, she  
10 does not, I believe, any of the individuals were  
11 prosecuted. She has -- there was an issue with some  
12 evidence of an ongoing property dispute between her father  
13 and I guess her former mother-in-law, and there was an  
14 issue as to whether or not that evidence was going to be  
15 collected, and that is her recollection of the event.

16 **THE COURT:** I'm sorry. What her in-laws?

17 **MR. GRAHAM:** The issue was that the assault  
18 occurred in the bedroom of I believe her sister, and there  
19 was a property dispute between her father and her  
20 mother-in-law regarding who was going to receive ownership  
21 of the property in the house, which would include this  
22 particular evidence, and what occurred was that all of the  
23 material which was in the room was turned over during this  
24 dispute. So it was not collected as evidence. It was  
25 turned over I believe to the mother-in-law, and, you know,

1 obviously this is something that happened a long time ago.  
2 I think her story is generally consistent.

3 Defense counsel attempts to draw facts that she  
4 has given wildly different stories, but the fact of the  
5 matter is, he asked her very specific questions in her  
6 deposition, and nothing in her deposition is inconsistent  
7 with the medical reports that she had made, and to the  
8 extent that there may be some form of discrepancy, what we  
9 learned -- we just got the deposition of her -- one of her  
10 treatment providers last week scheduled by defense  
11 counsel, and I think it is incredibly revealing, it is  
12 something we -- I have a copy of it today, and I'm happy  
13 to present it to the Court -- it goes not only to this  
14 issue, but also the issue of causation of harm from Henry  
15 Ford.

16 I can represent to the Court -- and again, I'm  
17 happy to present the deposition -- where -- and we'll get  
18 into this a little bit later -- where her therapist says  
19 in direct to questioning by defense counsel, her  
20 termination from Henry Ford caused her anxiety and  
21 depression, which limited her life activities, and that  
22 she was able to make this statement even though an  
23 assessment, even though this is an event which occurred  
24 years in the past. So I think it's incredibly relevant,  
25 but one of the other things --

1                   **THE COURT:** Okay. So you're indicating that  
2 this deponent, who is her therapist --

3                   **MR. GRAHAM:** Correct.

4                   **THE COURT:** -- after the -- following the  
5 claimed raped?

6                   **MR. GRAHAM:** This is someone that she sought  
7 treatment from September of last year through December of  
8 last year.

9                   **THE COURT:** Okay. So she didn't commence  
10 treatment until 2015 with this therapist?

11                   **MR. GRAHAM:** Correct.

12                   **THE COURT:** Which is after the filing of this  
13 lawsuit?

14                   **MR. GRAHAM:** Correct.

15                   **THE COURT:** And that the therapist indicated  
16 that issues relating to the sexual assault were still the  
17 subject in part of the treatment that she was receiving?

18                   **MR. GRAHAM:** Well, she indicated that they  
19 had discussed many issues, one of which at some point was  
20 the sexual assault, but she identified, you know, many  
21 other issues. I think --

22                   **THE COURT:** Was this person going to be  
23 called as a witness in the trial?

24                   **MR. GRAHAM:** We do plan to augment our  
25 witness list and to call her at trial.

1                   **THE COURT:** Augment the witness list? You've  
2 identified witnesses in the final pretrial order.

3                   **MR. GRAHAM:** She was not identified as a  
4 witness.

5                   **THE COURT:** Why?

6                   **MR. GRAHAM:** Because we submitted the final  
7 pretrial order before we learned about the treatment that  
8 had been sought after and had been performed. We didn't  
9 know any of the information regarding the fact that she --  
10 her treatment provider believed that there was anxiety and  
11 depression. We didn't know that some drugs that plaintiff  
12 had been prescribed had been prescribed.

13                   **THE COURT:** She didn't know that?

14                   **MR. GRAHAM:** What we didn't know was the  
15 assessment of the medical care provider. We had not  
16 received these records which were subpoenaed by defense  
17 counsel I believe in March. We didn't have the deposition  
18 scheduled by defense counsel until last week.

19                   My understanding is that the defense counsel wants  
20 to do another deposition with this witness. This is  
21 someone that we had not proposed as a witness. We had not  
22 subpoenaed the records, but defense counsel subpoenaed the  
23 records, scheduled the deposition. We drove to Saginaw,  
24 spent the day up there, and it's my understanding that  
25 we're going to have some supplemental call with the

1 witness later. We have a deposition, which we paid for  
2 now, because of the deposition that was scheduled by  
3 defense counsel.

4 So yes, we believe that there are relevant  
5 facts -- extremely relevant facts which have come out of  
6 the deposition that defense counsel scheduled. We don't  
7 believe that there is any prejudice because defense  
8 counsel has already deposed her once, and will like depose  
9 her again, has subpoenaed and has received and reviewed  
10 the deposition all of the records with her treatment  
11 provider.

12 So in terms of the relevancy, it is extremely  
13 relevant because it's information that we didn't know the  
14 assessment her treatment provider. It was not something  
15 that we sought to introduce, but something that defense  
16 counsel made us spend time, cost and energy to go and have  
17 this deposition, pay for the deposition transcript and  
18 review the subpoenaed documents.

19 So yes, they obviously had an intent of using this  
20 information regarding her emotional harm or regarding her  
21 sexual assault, because why schedule the deposition if you  
22 have no interest in using the evidence. Now that they  
23 have done it and there is helpful information in the  
24 deposition, I think it is absolutely appropriate that it  
25 be introduced.

1           The issue regarding --

2           **THE COURT:** Assume for a minute that she's  
3 not going to be permitted to testify in the case, isn't it  
4 reasonable to expect that a fact finder might conclude  
5 that the source of her distress is the impact, all be it  
6 from 2000, there aren't too many people who experience, I  
7 assume, a gang rape, which is what you're describing, and  
8 don't live with that the rest of their lives as a major  
9 issue in their lives, and if you're asserting emotional  
10 harm and psychological damages from the termination here,  
11 isn't it pretty obvious that the jury should know about --  
12 at least that she experienced what she says that she  
13 experienced, the sexual assault, back in 2000, and perhaps  
14 the more appropriate issue is the scope of the testimony  
15 permitted as it relates to that occurrence, but the  
16 occurrence itself has to be relevant to what is the source  
17 of her emotional harm.

18           **MR. GRAHAM:** Well, I think first I would say,  
19 I don't know that is necessarily the case. I think --

20           **THE COURT:** We don't, but the jury could very  
21 well conclude that, couldn't they? I mean, if I'm  
22 listening to testimony about the psychological injuries  
23 that she's going to testify about, and then I learn that  
24 she was gang raped, I've got to assume that it has caused  
25 ongoing distress and problems for the woman and will for

1 the rest of her life.

2 **MR. GRAHAM:** Well, I think the first thing to  
3 remember is that we are dealing with a case where it is  
4 retaliation as a result of reporting unpaid wages and  
5 lunches, and that I think that it's fairly clear that  
6 emotional harm -- the type of emotional harm that one  
7 might suffer as a result of being terminated wrongly is  
8 not quite the same type of emotional harm that some woman  
9 would experience if they had been gang raped. Both  
10 perhaps could cause some type of harm, but I think the  
11 jury might be confused by attempting to assess how much of  
12 this event which happened 16 years involving a violent  
13 sexual act, is related to emotional harm dealing with a  
14 termination, and I think one, it would confuse the jury,  
15 and two, the way defense counsel has presented it, where  
16 he wants to present the sexual assault for two purposes;  
17 one, to say that she is a liar or she has a propensity for  
18 untruthfulness, and two, that she still suffers from  
19 emotional harm as a result of this event, puts plaintiff  
20 in a fairly difficult position, because to every argument  
21 that we make establishing the truth of the event which  
22 occurred defending the fact that she was raped, we are  
23 then presenting to the jury facts that, you know, even  
24 though this was 16 years ago, they are hearing it for the  
25 first time, and if you present horrible facts, even if

1 someone could have recovered from an event 16 years later,  
2 if you're hearing it for the first time, you're thinking,  
3 oh, my goodness, you must be so damaged from that event  
4 because it is the first time that you're hearing about the  
5 events.

6 But every argument that we make saying she's  
7 truthful in her assessment, we argue in effect that she's  
8 still suffering from great emotional harm. For every  
9 argument that we make that she has dealt with this issue,  
10 and that she, in fact, is not suffering from emotional  
11 harm, that she has resolved this issue within herself, and  
12 she has moved on, the jury is going come to the impression  
13 that well, certainly you wouldn't be over an event like  
14 that. So it must not have happened.

15 So it puts us in this pretty difficult position  
16 where either way, if we're forced to make both arguments,  
17 it is incredibly and duly burdensome because we're put in  
18 the position where we have to tread incredibly carefully  
19 in making an argument that supports both the fact that she  
20 was truthful, and that she no longer suffers from  
21 emotional harm.

22 This gets back to the reason why I brought up the  
23 deposition in the first place, and that is because in the  
24 deposition her treatment provider discusses something  
25 which I think is fairly common knowledge, and that is that

1 individuals who suffered a sexual assault can recount the  
2 details of it in different ways, that you can remember it  
3 differently, and that this is not unusual, that if you  
4 have assaulted, obviously your brain shuts down, and  
5 you -- the memories that you're going to collect from that  
6 events are not as clear as they would be at other times in  
7 your life, and to argue that if there is any type of  
8 inconsistency in the way that she has recounted her  
9 assault over the past 16 years in any situation, I think  
10 defendant is basically arguing that it is fair game to, in  
11 a way, prey on the confusion that an assault victim faces  
12 after an assault occurs, and I think that's somewhat  
13 reprehensible.

14 In terms of -- so you got the two issues. You got  
15 the fact that they are arguing that there is some  
16 untruthful activity. I think one, her statements are  
17 largely consistent, and two, if there is any type of  
18 inconsistency, it can be explained by the fact that she  
19 suffered a sexual assault.

20 In terms of emotional harm, we've cited cases in  
21 our brief which discussed the length of time which might  
22 be reasonable -- one of the cases was 17 years ago --  
23 where there may be an event which happened in the past,  
24 and I believe in that case it even dealt with an issue of  
25 truthfulness, and the Court said look, 17 years later this

1 may be irrelevant, and I think the fact that it has been  
2 16 years, coupled with the fact that the type of harm that  
3 she would have experienced is completely unlike the type  
4 of harm that we are arguing in a retaliation for  
5 complaining about unpaid lunches, but it's genuinely an  
6 irrelevant issue.

7 **THE COURT:** Okay.

8 **MR. GRAHAM:** So that is the issue with sexual  
9 assault.

10 Again, finally -- and I kind of mentioned in terms  
11 of the way that we would be forced to deal with this, I  
12 mean, really what it would force us to do, especially if  
13 we don't limit this in pretty substantial way, is we may  
14 end up having a trial about Natalie Reeser's sexual  
15 assault, and I think that's obviously not something that  
16 we should get into.

17 **THE COURT:** All right. Why don't I hear from  
18 Mr. Miglio on the sexual assault.

19 **MR. MIGLIO:** Well, a couple of things, your  
20 Honor. This is the first time ever that there was a  
21 suggestion that there was going to be an amendment to the  
22 final pretrial order to add a treater or psychologist or a  
23 professional counselor to now testify in a trial that's  
24 three weeks away. Had they listed an expert, a treater or  
25 anybody on the witness list and or through discovery, we

1 would wanted the opportunity to have the plaintiff  
2 examined like is typical in every case where there's going  
3 to be testimony about psychological damage and the  
4 causation for it, although a treater isn't an expert and  
5 can testify about causation, but whatever.

6 When we were here at the final pretrial  
7 conference, it was revealed to us at or about that time  
8 that she was know seeing a new counselor, and  
9 interestingly, she saw the counselor while the trial was  
10 set to go in December. She started seeing a counselor in  
11 September, and then she stopped seeing the counselor on  
12 December 17th or has not been back after trial was  
13 adjourned.

14 So what we have here with respect to the sexual  
15 consult is that she testified in the deposition a year ago  
16 that she was sexually assaulted, that it was one  
17 assailant, that it happened in the bedroom of the parents'  
18 home, taking psychotropic medication since that time,  
19 Zanax and something else, and that as a result of this  
20 traumatic termination that she suffered at Henry Ford  
21 Health System, she's had flashbacks. She's had panic  
22 attacks. She's had all kinds of stuff that she attributes  
23 to the termination for a traumatic event.

24 So one of the motions that we have is to reduce  
25 that as being in evidence, but let's talk about the rape.

1           So in her deposition she said there was one  
2           assailant, and it happened in her sister's bedroom.  
3           Because her father didn't want her sister's belongings to  
4           leave the room, he would not allow them to be prosecuted  
5           and the assailant went scot-free.

6           So the police report from that event says that she  
7           was the one that didn't want to press charges. She  
8           refused the rape kit, and she refused to give the identity  
9           of the assailant, even though she knew who the assailant  
10          was.

11          When she came for treatment at Henry Ford Health  
12          System's Medical Network in 2007 and 2008, her story now  
13          changed. It was now two men who held her legs and hands.  
14          One man raped her, and since that time she said she was  
15          feeling depressed, isolated, withdrawn and that she has  
16          occasional crying spells.

17          Later on she told somebody in the treatment  
18          session that she was not only sexually assaulted, but she  
19          was stabbed by one man who had held her down, and that her  
20          assailant is serving life sentences. She was stabbed,  
21          raped and beaten, and then the crowning glory of this is  
22          when we took the counselor's deposition in Saginaw, and  
23          now the story went to what Mr. Graham is suggesting that  
24          she was not sure if it was one or two. She wasn't sure if  
25          there was a prosecution, but she was raped, stabbed,

1 beaten, dragged from the house, left on the premises for  
2 dead. So it is relevant in the context of a case where  
3 credibility is so important.

4 If you remember, your Honor, this was an argument  
5 that this plaintiff said that she received two phone calls  
6 from her supervisor for which we submitted records showing  
7 there wasn't any calls, that the supervisor threatened her  
8 if she went to H.R. and went to the state. Significant  
9 credibility issues.

10 So now we have somebody who claims to be having  
11 had her medication bumped up, claims to be having all of  
12 these traumatic flashbacks which she testified to, and  
13 they want to preclude us from saying, hey maybe there's  
14 something else that's going on that will contribute to the  
15 alleged psychological injuries that she claims she is  
16 suffering.

17 I mean, it is absolutely unbelievable that we  
18 would not allow the jury -- and juries have the ability to  
19 go through this -- that what's she's asking for from my  
20 client in the way of psychological damages is, in fact,  
21 something that really was already there and really was a  
22 continuing aspect.

23 Now when we took her counselor's deposition on  
24 Friday -- and by the way, we wanted to take the  
25 counselor's deposition for discovery. The fact that we

1       took the counselor's deposition, and I believe at the  
2       pretrial conference, you required them to supplement their  
3       responses because they then said there was somebody else  
4       they were seeing. So we wanted to take the counselor to  
5       see what's going on in her life. She's got employment.  
6       She's got a whole lot of things going on, not with the  
7       idea that all of a sudden by taking a discovery  
8       deposition, we can see that counselor can now testify.

9               But so we took the deposition and got the records,  
10       and throughout the records what the counselor said, and we  
11       have yet to receive the intake form, the counselor said  
12       that there are many past traumas, and that's what she was  
13       treating her for. So even when you break it down  
14       according to what the counselor said, the counselor's  
15       admission is yes, there are other things going on with the  
16       rape.

17              I don't want to dwell on the nuances about the  
18       rape. I think it is significant for the jury to hear that  
19       this particular plaintiff has had what she claims to be a  
20       sexual assault, taking medication for which she sought  
21       treatment, and continues to seek treatment up until  
22       December of 2015, and that the jury can ascertain if  
23       that's the case.

24              And then with respect to making false statements  
25       about a traumatic event, well that's very close to what's

1 going on in this case where she says all kind of things  
2 happened, made a statement to the police that's  
3 contradicting her deposition testimony, contradicts what  
4 she told other people throughout 2007 and 2008.

5 So I don't know where we're going to go with it,  
6 but to say that we can't introduce it and can't let the  
7 jury decide how truthful she is when she tells all of  
8 these stories, including in her deposition, to me is  
9 extreme prejudice to our client because this is an issue  
10 of credibility. These are previous statements that she  
11 made that are false and inconsistent, and the issue of the  
12 alleged sexual assault -- I say that lightly -- but the  
13 issue of the alleged sexual assault could have significant  
14 ramifications.

15 She's testified -- and they've said in the  
16 pretrial statement -- she's been on -- I can't remember  
17 the medication, whatever it was --

18 **THE COURT:** Paxil.

19 **MR. MIGLIO:** Paxil -- that she was taking --  
20 of course, that's not true either -- but she's been taking  
21 10 milligrams of Paxil for the last several years, and  
22 then recently it was up because she is experiencing all of  
23 these flashbacks.

24 So all of that is fair game, especially in a case  
25 where wage loss is minimal, if not significant, and she's

1 going to ask the jury for an award based on damages,  
2 emotional distress damages and trauma.

3 **THE COURT:** Well, the fact that she sought  
4 treatment for this emotional difficulty that she's having  
5 certainly is appropriate, but the inconsistencies among  
6 her statements and the truth or falsity of what she's  
7 describes, how do you prove that? Are you going to call  
8 the officers in who took the statement, and how much time  
9 are we going to spend whether she lied about an incident  
10 16 years ago?

11 **MR. MIGLIO:** Not very much because the  
12 records are already exhibits as part of the pretrial  
13 statement. I can call a custodian of records if I'm  
14 required to. There is a custodian of records for the  
15 medical records where she gave these statements that these  
16 assailants were prosecuted, serving life sentences, and  
17 then it went from being raped to being raped and stabbed,  
18 to be raped, stabbed and being bludgeoned. We can introduce  
19 those records. She can deny it or she can be asked in  
20 cross examination if she made these statements.

21 **THE COURT:** When you say introduce those  
22 records, what records? Police reports?

23 **MR. MIGLIO:** The records that she sought when  
24 she sought psychological treatment at Henry Ford Health  
25 System. In 2008 she gave two different -- completely

1 different accounts of what the sexual assault was. She  
2 gave a completely different account to the Dryden Police  
3 Department and police records to what the assault was, and  
4 her deposition testimony is diametrically opposed to all  
5 three or four versions of the events.

6 **THE COURT:** Well, police reports are not  
7 normally admissible. So --

8 **MR. MIGLIO:** She can be asked on cross  
9 examination though as part of extrinsic evidence to see  
10 whether or not to prove that she's not credible, and that  
11 she lacks trustworthiness as a witness.

12 The issue of getting them in is not -- the issue  
13 of getting them in -- I mean, that's like saying her  
14 trauma in this alleged trauma that she suffered as a  
15 result of termination, she's given five different  
16 explanations about what happened, we should be allowed to  
17 cross examine her on that. I mean, this is a credibility  
18 issue.

19 I agree that maybe extrinsic evidence would not be  
20 admissible, but the fact that she said all of these  
21 different statements that are different goes to her  
22 credibility.

23 But as I stand before, I'm a little more concerned  
24 about this Johnny come lately argument that somehow they  
25 are going to amend the witness list because that to me

1 is -- they're going to amend witness list. Mind you, to  
2 add this person who's treating her for rape, but we can't  
3 ask her about the sexual assault as a contributing factor  
4 to her alleged mental and emotional distress.

5 **THE COURT:** Did you have other treaters --  
6 any other treaters that you deposed?

7 **MR. MIGLIO:** No, we just subpoenaed records,  
8 and there's another issue that I guess we should raise  
9 with the Court in connection with her mental state -- and  
10 I know that I'm getting ahead of myself -- but she claims  
11 that she testified at length about how after she was  
12 terminated by our client in 2014, she saw a Dr.  
13 Kahnamouei, and he treated her, her primary care  
14 physician -- this is in her deposition -- he treated her  
15 for anxiety attacks, panic attacks and that he upped her  
16 Paxil prescription. So we subpoenaed the records from Dr.  
17 Kahnamouei and guess what? He didn't see her at any time  
18 after December of 2013.

19 Counsel here argued to you knowing full well that  
20 he has the records that no treatment by Dr. Kahnamouei  
21 after December of 2013, that that would be something that  
22 she would be allowed to testify to.

23 So part of our concern here today is that we don't  
24 have the records, and I don't want her getting on the  
25 stand and then saying, you know? I don't remember. Maybe

1       it wasn't Dr. Kahnamouei. Maybe it was somebody else who  
2       upped my Paxil, but I'm taking more Paxil as a result of  
3       Dr. Whoever.

4               So we're asking the Court to rectify that because  
5       Dr. Kahnamouei has never seen her in 2014. Of course, if  
6       there isn't anybody, that's another issue of credibility,  
7       but that's another issue that relates to this whole kind  
8       of mental and emotional distress issue.

9               So as far as we're concerned, the rape -- and  
10      again, I'm mindful that sexual assault is a very serious  
11      thing, and I have no desire to dwell into it, and I have  
12      no idea what's she's going to be allow to say on the  
13      stand, but to the extent that becomes an issue as to a  
14      competing or the cause for what she claims is mental and  
15      emotional distress, the defendant should be able to  
16      inquire about that, as well as to the extent she makes  
17      claims about her truthfulness and so forth, that should be  
18      fair game because that's an ability to cross examine a  
19      witness about previous untruthful statements that should  
20      be admissible.

21              **THE COURT:** All right. Well, so the -- do  
22      you get pharmacy records to demonstrate what meds she's  
23      taking? I'm assuming she goes to the same pharmacist.

24              **MR. MIGLIO:** We have what the doctors  
25      prescribed and the dosages they've prescribed, and quite

1 honestly, they don't support what she said. She's been  
2 prescribed 40 milligrams of Paxil over a period of several  
3 years. So another issue with respect to credibility that  
4 she just upped them by seeing a doctor who doesn't have  
5 any records of seeing her.

6 I mean, this isn't a sole practitioner doctor.  
7 This is a practitioner who is part of the Henry Ford  
8 Health System Network who worked out of Henry Ford Macomb  
9 Hospital. We have all of the records for her from the  
10 Henry Ford Health System Network, including Dr.  
11 Kahnamouei.

12 So we have no records whatsoever of any visits  
13 that she made in 2014, and for counsel to assert that in  
14 the motion that that's what she's going to testify about  
15 is disingenuous and inappropriate.

16 **THE COURT:** Okay. Mr. Graham?

17 **MR. GRAHAM:** Well first, I would like to say  
18 that we have signed authorizations for all of her medical  
19 records. So in terms of not having access to anything,  
20 opposing counsel should have access to everything that  
21 they need.

22 In terms of -- again, I'm sure this is going to  
23 come up in another motion -- but in terms of being able to  
24 bring in the information in the deposition, I mean, you  
25 just heard defendant talk about the medical records which

1 have been subpoenaed in order to support an argument that  
2 we making. Obviously, these records and testimony are  
3 going to be relevant. The deposition just happened on the  
4 15th. So really there has not been time in order to do  
5 that. Our plan is to get it done by Friday. That's  
6 aggressive. I don't know if we can. If not, it will be  
7 on Monday.

8 I think it's important that defense counsel raises  
9 the issue again of well, isn't it convenient that she went  
10 to seek treatment -- in fact, he actually asked the  
11 treatment provider in her deposition, isn't that the case?  
12 Haven't you heard of this happening? Haven't you heard of  
13 people doing this, and she said yeah, I have heard of  
14 people doing this, and he said, what about Natalie Reeser?  
15 Is Natalie Reeser doing this? She said no, I believe  
16 Natalie Reeser is here for treatment. I made an  
17 assessment of her truthfulness. I made an assessment of  
18 her conditions, and I know that she is here because she  
19 genuinely needs help.

20 I asked her in diagnosing a patient, and she had  
21 said that she sent Natalie to a doctor for prescriptions  
22 for drugs to deal with anxiety and depression. I said,  
23 well do you assess truthfulness and make a diagnosis, and  
24 she said yes, and I assessed that Natalie Reeser was being  
25 truthful, both in terms of the need for medication as a

1 result of the termination from Henry Ford and also from  
2 the sexual assault.

3 In terms of the sexual assault being inconsistent,  
4 it is not at all inconsistent with the deposition  
5 testimony. In the deposition testimony, I think we  
6 discussed the sexual assault in maybe two, three pages.  
7 There was one assailant. You know, whether or not we're  
8 describing this as a gang rape or just multiple  
9 individuals involved, her testimony has been that there  
10 were two individuals who held her down and one who  
11 assaulted her. That is not inconsistent with her  
12 deposition testimony.

13 In terms of being stabbed during the event,  
14 counsel never asked her, were you stabbed during the  
15 event? This is not inconsistent with her deposition  
16 testimony.

17 In terms of medical records, from I think -- you  
18 were right to raise the issue of the police report. In  
19 terms of medical records, there's no indication in the  
20 medical records in which she discusses the prosecution or  
21 non-prosecution of these individuals, that Natalie Reeser  
22 was the one that made the statement. There is no one that  
23 is going to verify that. For all we know her parent  
24 accompanied her on the visit and made that statement.

25 So Natalie, I can tell you, has no memory of

1 speaking to a doctor, especially that doctor in making a  
2 statement about the prosecution of those individuals.

3 In terms of -- again, counsel said that he is not  
4 going to go into the nuances of this, but yet, this is  
5 exactly the argument that he wants to go into the nuances  
6 of it, that he wants to compare multiple accounts. Was  
7 there a rape kit? How many assailants were there? Were  
8 you stabbed? Where did the rape occur? These are not  
9 questions simply establishing that there is an event that  
10 could have caused emotional harm. These are nuance  
11 questions. So I'm not quite sure where the argument that  
12 this is not nuance comes in.

13 In terms of the increase of drugs, again, it is  
14 our position that there was an increase in drugs, and like  
15 I said, in fact, in terms of the deposition testimony  
16 which was just presented or that we have been  
17 discussing -- and again, happy to present it to the Court,  
18 will present it in our motion -- she indicates that  
19 Natalie was sent to a doctor, and was prescribed drugs and  
20 received those drugs as a result of anxiety and  
21 depression, as a result of her termination from Henry  
22 Ford.

23 So the point that there's some type of causation  
24 issue -- and we'll into that in a little bit too I  
25 guess -- that her medication was increased, that

1 substantiated in the testimony of her treatment provider,  
2 which again was deposed by opposing counsel. It was a  
3 choice made, and you don't get the benefit of subpoenaing  
4 all the records, having a deposition last all day and  
5 schedule a second deposition, and use the records that you  
6 subpoenaed in your argument, and then say well, we're not  
7 allow to do the same.

8 So it is our position that will be introduce  
9 those, and they will support the fact that she has  
10 received increased medication.

11 **THE COURT:** Well, haven't the medical records  
12 been stipulated to in the --

13 **MR. MIGLIO:** No, your Honor, not for this  
14 particular treater, and we really don't have an intention  
15 to use them. We took the deposition where she was,  
16 whether she was working, what else was going on. I have  
17 no intention of using those records.

18 **THE COURT:** And you're not intending to  
19 redepose the witness?

20 **MR. MIGLIO:** No -- well, the only issue with  
21 respect to the witness, you when you go -- well, I don't  
22 know if you know -- but when you see a psychologist or a  
23 psychiatrist, typically they have you fill out an intake  
24 form and says, why are you here? What kind of previous  
25 things? What's your employment situation? What's

1       bothering you, et cetera, et cetera. We subpoenaed those  
2       records, and usually that's the most valuable piece of  
3       information that we get.

4               We drive up to Saginaw. Do you have everything?  
5       Did you have her fill out an intake form, and the  
6       counselor says yes, but I didn't produce it to you. It's  
7       in a different folder or whatever, and so I can send it to  
8       you, and what I said to Mr. Graham was, well, she said she  
9       would send it to me, and if we need for some reason to  
10      have a follow up deposition, we can do a follow up  
11      deposition. That's the only particular issue, but they  
12      knew --

13               **THE COURT:** And you have not yet received it?

14               **MR. MIGLIO:** Well, I just had my paralegal  
15      call. She said she -- the therapist said she was going to  
16      send it last Monday after the Friday deposition. She  
17      didn't send it. I'm not too suspicious. I had my  
18      parallel call and she talked to her today, and said that  
19      she is going to send it, but not until after 1:00 today.  
20      So I expect to get that.

21               **THE COURT:** Going to send it how?

22               **MR. MIGLIO:** Fax or email, but that's the  
23      issue. We have no intention to use these records. My  
24      only point with respect to the records was that you can't  
25      say it is not a contributing factor. They argued in the

1 brief that she's completely recovered. We shouldn't be  
2 able to go back 17 years, and that's just not the case,  
3 even according to their own treater. So that was the  
4 point.

5 But let me make one other point. They knew of  
6 this treater at the time of the pretrial conference. They  
7 knew of him. We talked about it and, in fact, we also  
8 knew about that this was this kind of case. They filed a  
9 pretrial conference, the pretrial order, and they made an  
10 argument in their brief. If you look at brief in response  
11 to our motion to strike her testimony regarding medical,  
12 that as a result of these illegal actions, referring to  
13 the March 7, 2014 termination, plaintiff sought treatment  
14 with her primary care doctor, Dr. Reza Kahnamouei, after  
15 her suspension because, quote -- and they quoted right  
16 from her deposition -- because my anxiety came back, my  
17 panic attacks came back, I needed medicine.

18 They say plaintiff testified that the medicine was  
19 not working, made me depress. It made me very anxious,  
20 and her primary care physician upped my medication. Her  
21 primary care physician Kahnamouei has no records that he  
22 saw her in 2014.

23 I want -- I'm asking the Court in the context of  
24 this, that either they have -- I don't want her getting on  
25 the stand saying, I was wrong. It wasn't Dr. Kahnamouei.

1 It was some other doctor. We have all the records. They  
2 should not be able to next come out at trial and say, we  
3 have some other doctor. They've never identified that  
4 doctor. We've gone extensively. He said that he has  
5 given us all of the authorizations. Nobody saw her in  
6 2014 following her termination, and they put it in the  
7 pretrial order.

8 So I want them to be precluded from producing --  
9 from her saying anything other than what she has already  
10 said because there are no other records showing such a  
11 visit by any doctor. That's what I'm asking for, but --

12 **THE COURT:** Was this a motion that you filed?

13 **MR. MIGLIO:** Well, I'm just saying when I  
14 looked at his response to our motion in limine, he's  
15 saying she wants to get on stand and say that she went to  
16 Dr. Reza because the medication was not working following  
17 her termination; that she saw the doctor; that he up her  
18 medication when she was having panic attacks that she  
19 reported to him. There is no such information. That's  
20 what I'm responding to what they said, and I don't think  
21 that he should be allowed to say that.

22 As with respect to the rape and the counselor, no,  
23 we're not intending to call that woman. We're not  
24 intending to introduce the record. We took it to see what  
25 she's doing. She's got a lot of things that she says goes

1 on, that she had to move up north and all of this other  
2 stuff, and that's what -- that's the story, and we didn't  
3 know anything about this treater until the final pretrial  
4 conference, even though she had been seeing the treater  
5 way back in September of 2015. So they've been not only  
6 diligent in identifying that stuff, they've been doing it.  
7 So we don't want to get another doctor at trial is what  
8 I'm saying.

9 **THE COURT:** Okay. Mr. Graham?

10 **MR. GRAHAM:** Well, I think you were right to  
11 raise the question is this in a motion, because it's not.  
12 This would be motion in limine or some other form of  
13 presentation to the Court. This isn't something that we  
14 talked about to prior to this hearing. It's not something  
15 that was submitted to the Court, and frankly we're talking  
16 about whether or not this sexual assault should be allowed  
17 in to present arguments about emotional harm and  
18 unfruitfulness, not about whether or not she's able to  
19 testify that a treatment provider increased her  
20 medication. That's an unrelated issue, and it's not  
21 briefed for the Court right now. So I don't feel we need  
22 to go into it at great length.

23 **THE COURT:** Well, you have a -- do you have a  
24 claim that this was some other treater? You have seen the  
25 records, and she was receiving some prescriptions along

1 the lines that you described?

2 **MR. GRAHAM:** I can't represent to the Court  
3 which doctors right now -- which doctors saw her and  
4 increased her treatment. I can't because that's not  
5 something that we are here to argue about. I can guess at  
6 what would be there, but frankly, I think it would be  
7 inappropriate for me to guess, because I think the  
8 argument is inappropriate.

9 So I could either -- well, one, I don't think it's  
10 appropriate that we discuss this issue at all because it  
11 was never briefed as a motion in limine, but if we are  
12 going to discuss, then we should have supplemental brief  
13 on the issue rather than fiddling around whether or not  
14 there was an additional doctor or whether or not the  
15 medication was increased.

16 I would also --

17 **THE COURT:** So the short answer is no, you  
18 don't know of any other doctor who was prescribing the  
19 medicine that she made have been confused about?

20 **MR. GRAHAM:** I feel like agreeing that  
21 statement would be suggesting that there was no other  
22 doctor, and I don't know that is the case. I cannot give  
23 you a name standing here at the podium right now.

24 **THE COURT:** All of her medical records are  
25 marked as potential exhibits in the case?

1                   **MR. MIGLIO:** Every treater, every physician,  
2 every health care institution that she listed in  
3 interrogatories responses and discovery responses and in  
4 her deposition, we have subpoenaed them, and the records  
5 should be part of what our final pretrial order is with  
6 the exception of this last one who we didn't even know  
7 about until after the final pretrial conference, and  
8 there's no such any visits whatsoever, but we have a  
9 couple of issues here.

10                   They are arguing that she's going to be testifying  
11 about that, and citing to her testimony, and they don't  
12 even have support for it.

13                   Secondly, we only learned about this of what she  
14 wanted to testify about in response to the briefing that  
15 she's saying, you know, she saw Dr. Kahnamouei in 2014  
16 after her termination. So that's the reason why we're  
17 bringing it at this point three weeks before the trial,  
18 and that he upped her Paxil and that's what she intends to  
19 testify about, that the Paxil I was receiving was not good  
20 enough, and now Dr. Kahnamouei, after I got fired, upped  
21 it for me when I saw him. So that's the issue, and I  
22 apologize for bringing this up, but we're talking about  
23 what medical records are, and what we're learning as we're  
24 progressing to trial, and it's an issue for us.

25                   **THE COURT:** Okay. The general proposition of

1 the medical records will be admissible. I guess if they  
2 disclose someone who is increasing her Paxil in 2014, that  
3 would be potentially available to explain the variance  
4 with her testimony, but we're a little bit astray on the  
5 question of the admissibility of evidence relating to the  
6 sexual assault -- claimed sexual assault, and as my  
7 questioning has already indicated, generally speaking  
8 the -- that the fact that she sought and may still be  
9 seeking treatment relating to that sexual assault is all  
10 admissible evidence.

11 The underlying circumstances of that, and her  
12 inconsistent statements concerning the assault itself are,  
13 I think, the Court concludes generally going to be  
14 inadmissible. I'm not granting the plaintiff's motion in  
15 limine as it relates to that testimony which may,  
16 depending on the manner in which it is presented by  
17 defense counsel, may ultimately be admissible. So I'm not  
18 precluding it altogether, but my guidance would be that  
19 generally I think inconsistent statements about the manner  
20 in which this assault, if it did occur, would -- even  
21 though credibility is obviously an important assessment  
22 for the jurors to make, there's -- it's present as it  
23 appears to me that we could end up going on for hours  
24 about the various statements made and their accuracy, and  
25 it seems to me as it relates to that objective and the

1 cross examination as a general proposition, it is unlikely  
2 that the Court will find the evidence admissible, but  
3 again, it will depend on the manner in which the  
4 examination goes of the plaintiff, and the manner in which  
5 defense counsel at the time proposes to introduce it.

6 So defense counsel is generally not to admit such  
7 evidence without first at the trial getting permission  
8 from the Court to address questions going to those issues  
9 of inconsistencies.

10 What's next?

11 **MR. GRAHAM:** Next is, I think, maybe a more  
12 straightforward issue. The second issue that we raise is  
13 financial assistance that Fiona Bork provided to Natalie  
14 Reeser, and she did this a couple of times over the course  
15 of Natalie's employment with Henry Ford.

16 Basically plaintiff's brother became ill, and  
17 plaintiff's apartment flooded, and in response Fiona Bork  
18 provided financial assistance to Natalie Reeser.

19 Now we would not have even thought to raise this  
20 issue, but it came up repeatedly in Fiona Bork's  
21 deposition, and our fear -- all of this are events that  
22 occurred long before Natalie's reports, Natalie's  
23 complaint internally to Henry Ford, Natalie's suspension,  
24 Natalie's termination. It really does not have anything  
25 to do with the allegations or the defenses in this case,

1 and we're afraid defense counsel may use this as  
2 impermissible character evidence specifically to show that  
3 Fiona Bork is a generous or truthful, good character  
4 individual, and that the jury should be sympathetic  
5 towards her or find her more credible for these reasons,  
6 and so we simply ask that the Court exclude this  
7 completely irrelevant information about Fiona Bork giving  
8 Natalie Reeser money.

9 **THE COURT:** Okay. I don't really need  
10 response to that argument. I agree that it is not  
11 admissible as character evidence. It might be appropriate  
12 at the trial or at the point of instructions to a jury to  
13 say that, but I do think the manner in which the two  
14 interacted and the relationship they had is generally  
15 admissible evidence, would assist the jury in deciding  
16 whether the -- whether Ms. Fiona acted with retaliatory  
17 intent for the plaintiff's exercise of protected rights  
18 under the FMLA, and so it's -- that motion will be denied.

19 Next, evidence of her prior work history?

20 **MR. GRAHAM:** Correct. So here opposing  
21 counsel is indicating that they are interested in  
22 introducing this evidence for three purposes: One, that  
23 it is after acquired evidence that she would have been  
24 terminated. Here specifically they are referencing -- and  
25 almost their whole argument is based around this

1 application that Natalie supposedly sent to Henry Ford.

2 This document is --

3 **THE COURT:** Supposedly sent?

4 **MR. GRAHAM:** Well, we have no idea where it  
5 came from. The first time that we ever learned of this  
6 document was in the response to our motion, and so  
7 Natalie's signature is not on the document. Her name  
8 appears on the signature block, but we've never seen this  
9 before. We've never been able to ask anyone at Henry Ford  
10 about the application.

11 So as we state in our brief, it's inappropriate to  
12 use information that has not been previously disclosed in  
13 a motion or certainly at trial. It's not on the pretrial  
14 list of exhibits. It's not in any document that has been  
15 turned over. I think we got it April 14th. So it's not  
16 quite clear what it is or where it comes from, but  
17 certainly we would ask that it be excluded.

18 Now even it's not excluded, we still think that  
19 there are problems with it. One is that we believe that  
20 the application has somewhat inconsistent language in  
21 stating that, you know, it does say that this is something  
22 if you leave out information, then it may be a terminable  
23 offense, but at the same time in the same paragraph, I  
24 believe it's states something different -- and I  
25 apologize. I will look for that as I continue.

1           More importantly perhaps, is the fact that  
2 defendants knew that the two jobs -- assuming that this is  
3 her application, assuming it came from Henry Ford -- she  
4 submitted a resume along with the application as the  
5 application says that you should, and on that resume she  
6 listed more than two jobs, and so their argument that  
7 well, she only listed two jobs on her application, and  
8 therefore, we would have definitely fired her had we  
9 learned that in her entire life she worked more than two  
10 place, is somewhat disingenuous because they have  
11 knowledge that she worked more than two places with the  
12 resume she submitted to Henry Ford.

13           So I mean first, the argument that they should  
14 be -- I mean, the entire argument is based on the document  
15 which should not be admitted and should not be considered  
16 in the motion, but if you were to consider it, there's no  
17 evidence that she would have been terminated because they  
18 already had knowledge of the inconsistency.

19           The second argument is somewhat odd. It argues  
20 that they should be able to make, I guess, some general --  
21 argue that she had a habit of frequently changing jobs,  
22 and Natalie was -- had jobs before she went through school  
23 and became a phlebotomist, that's true, and she did change  
24 jobs before she became a phlebotomist, but I think, as is  
25 the case for many people, before you finish your

1 schooling, you tend to switch jobs more often. Once you  
2 finish your schooling, you tend to stay at the same firm  
3 or at the same business, whatever it would be maybe a  
4 little bit longer because you found your career.

5 Here, it's fairly consistent that she's continued  
6 to work in the health field. She's worked at one of her  
7 employers, Quest Diagnostics, for well over a year in  
8 total, and we don't think that it's appropriate that  
9 there's some evidence -- and also frankly, it's somewhat  
10 problematic to say we're arguing that Henry Ford wrongly  
11 terminating her, and then she was not able to find  
12 consistent work after she was fired from Henry Ford.

13 So she's put in the position where she has been  
14 attempting to find work and, in fact, we'll get to this a  
15 little bit late in terms of looking at --

16 **THE COURT:** Well, obviously work history  
17 after her termination has got to come in as it relates to  
18 whether she mitigated damages, right?

19 **MR. GRAHAM:** Well, I think it's fine to  
20 discuss her efforts to find work and her jobs. What I  
21 think we're objecting to is the purpose that defendant has  
22 identified that it intends to use that evidence for, and  
23 that purpose is to show that she is the type of person who  
24 frequently changes her job, and therefore, probably would  
25 not have stayed at Henry Ford for a long time any way,

1       which is --

2                   **THE COURT:**   So her work as a phlebotomist  
3       obviously, to the extent that you're looking at that as a  
4       different status in life, and that she had more continuous  
5       employment as a phlebotomist than she had before, any work  
6       history after her termination at Henry Ford is obviously  
7       going to be significant though for whether she's taken  
8       adequate steps or appropriate steps to mitigate damages,  
9       and whether or not. Her front pay will depend on, was  
10      this loss -- did she work to avoid losing income? Did she  
11      voluntarily go up north when pay is lower, or would  
12      reasonable mitigation require that she stay around in the  
13      area where the pay is higher? So --

14                   **MR. GRAHAM:**   I guess the issue -- this is, I  
15      think, a separate issue from defendant's motion which  
16      addresses the issues that you just discussed. What this  
17      is -- why this is a particular problem, I think, again is  
18      the specific argument that she is the type of individual  
19      that would frequently change her job, and this is a  
20      characteristic about her.

21                   **THE COURT:**   Instability, in other words.

22                   **MR. GRAHAM:**   Right, and not that she --  
23      regardless of what she did moving forward, that she would  
24      not have stayed at Henry Ford, that they should not have  
25      to pay, you know, two years in the future in front pay,

1 because Natalie Reeser has a habit of only working at jobs  
2 for one year, you know, and that's the argument they raise  
3 and that's the argument that we are specifically  
4 addressing here that is problematic; that they are able to  
5 make the argument that looking at the pattern of her work  
6 history, we can say to the jury that we don't owe her any  
7 damages because she would have left anyways, and you look  
8 at evidence that we submitted as part of the motion for  
9 summary judgment where Natalie says, you know, I love this  
10 place. I love my clients. I love working here. This is  
11 where I want to stay. They are like my babies.

12 There's no indication at all that Natalie was  
13 planning on leaving Henry Ford. None, and what they are  
14 attempting to do, according to their response is say yes,  
15 she was because that's what she does. That's the type of  
16 person she is, and that's the evidence that we are -- or  
17 the purpose that we're objecting to for the second  
18 argument.

19 **THE COURT:** All right. Thanks.

20 **MR. GRAHAM:** For the third --

21 **MR. MIGLIO:** Shall I hear from Mr. Miglio on  
22 that?

23 **MR. GRAHAM:** Well, there's one additional  
24 argument, if you want to --

25 **THE COURT:** Go ahead -- that's related,

1       that's a part of this issue?

2                   **MR. GRAHAM:** Correct. Opposing counsel had  
3       said that they were going to also attempt to use her past  
4       employment record to show again that she has a propensity  
5       for untruthfulness because she had somehow lied on her  
6       applications, but there's no one who is going to be  
7       presented who is testifying from those companies which is  
8       saying that Natalie Reeser lied on these applications, and  
9       this isn't information that we asked her to fill out.

10                  You know, we put in -- again this kind of goes to  
11       the frequent job changes and also the false statements.  
12       We cited a case, Barbour, which kind of looks at what is  
13       it that you should be considering here, and you're looking  
14       primarily at, you know, the similar jobs that she sought  
15       out, but I've don't want to get too much into that.

16                  The main point I think on the false statement that  
17       they are presented, there's no one that's going to testify  
18       that anything that she submitted as false. So to use  
19       those applications to imply that somehow she didn't  
20       provide the information that the employer was asking for  
21       is inappropriate.

22                   **THE COURT:** Okay. Thanks. Mr. Miglio?

23                   **MR. MIGLIO:** First of all, your Honor, we  
24       have an affirmative defense of after acquired evidence and  
25       resume fraud, which is recognized by the courts that says

1 if an employer discovers after a case is filed that the  
2 employee engaged in misconduct or lied and would not have  
3 been hired on the resume because they misrepresented or  
4 lied, that's a reduction in damages. That's a cap. The  
5 case is Nashville versus Banner Linen (sic) and a number  
6 of other cases.

7 We have always had that argument. At her  
8 deposition she was shown her resume that she submitted to  
9 Henry Ford Health System. She was asked a number of  
10 questions about it, and there were a number of things that  
11 number one she left off the resume. There were a number  
12 of things that she didn't include in her resume. There  
13 were a number of things that the jury will hear that she  
14 misrepresented when she was interviewed by her supervisor,  
15 who asked her, went down her resume, and so as an initial  
16 matter, we are entitled to introduce evidence showing that  
17 the false statements that she made and the information she  
18 left off her resume and her application, would -- had she  
19 been truthful and had we known about it at the time, would  
20 not have hired her, and even more so, when we learned  
21 about it in the deposition, that would have been the point  
22 in time when the misconduct was discovered. We would have  
23 testimony as falsification of employment records and  
24 resume is cause for termination.

25 So the whole thing about what statements she made

1 and what false statements she made, now this is a  
2 plaintiff who testified who lo and behold she admitted  
3 that she left off stuff on her resume because for some  
4 strange reason she's got two resumes; one if she is  
5 applying for a business job and another one if she is  
6 applying for a health care job, and the gaps in the  
7 employment don't match, the times that she worked there  
8 don't match, the reasons why she claimed and gave to the  
9 supervisor as to why she left are all false. So from the  
10 after acquired resume fraud defense, all of that  
11 admissible. That's number one.

12 Number two is I've never tried an employment case  
13 where the background and work history and the  
14 qualifications that the employee brings to the job are not  
15 fair game. I mean, the witness is going to take the stand  
16 and say, I was a wonderful phlebotomist for all of these  
17 years. I had all of this experience. I knew what I was  
18 doing. I mean, part of her work history is who the  
19 plaintiff is, and the jury is entitled to hear about that.

20 Number three, I had cases where -- and I'm sure  
21 this is not any different -- where a plaintiff gets on the  
22 stand and said, I would have worked in this job until I  
23 retired, and then you look back and you find as you do in  
24 this case, that she changed jobs every couple of months,  
25 and never held a job longer than one year or whatever the

1 case may be, and the jury is entitled as much as they are  
2 entitled to see whether or not they agree with her that  
3 she's worked for retirement, the jury is entitled to take  
4 her previous work history into consideration for whether  
5 or not they would give her front pay.

6 So all of that is completely relevant. It's  
7 completely significant relevant information, and more  
8 important -- and going back to the issue of the resume  
9 fraud -- we have the resume. We discovered in connection  
10 with this case, the employment application, it's an online  
11 application that she fills out, was not turned over to the  
12 plaintiff in the course of discovery. We discovered and  
13 immediately supplemented the response.

14 **THE COURT:** When?

15 **MR. MIGLIO:** We supplemented it three weeks  
16 or something, but -- and I would ask the Court that there  
17 is no prejudice there, and if they want to take a  
18 deposition of somebody about what the application is, the  
19 same would be true with respect to the treater, but the  
20 bottom line is, the entire defense -- I'm not going to  
21 rest on that employment application -- what she was  
22 interviewed for and what she told the supervisor all of  
23 which was false, which is significant, is on her resume  
24 that she submitted in connection with that.

25 **THE COURT:** How would that not have been

1 disclosed at the outset of the case?

2 **MR. MIGLIO:** What's that?

3 **THE COURT:** The application.

4 **MR. MIGLIO:** The application is apparently  
5 kept. They don't print it off and put it in the personnel  
6 file. It's kept electronically, and we just realized that  
7 at some point in time that it had not been printed off and  
8 produced it. So we produced it, but we had produced her  
9 personnel records, along with a number of other stuff,  
10 which included records from -- resume that she submitted  
11 to Henry Ford. She was examined on it at her deposition.  
12 So there's no mistake, and then what typically happened  
13 was by the time we took her deposition, we had subpoenaed  
14 her records from her previous employers.

15 So now you see she's got a resume. Well, you  
16 didn't work these dates that you put on the resume, and  
17 you told Fiona Bork that you left there voluntarily when,  
18 in fact you were fired. I mean, those are the kind of  
19 falsehoods that are extremely relevant and make a case for  
20 resume fraud after inquired evidence, but they had all of  
21 that. The only issue he's talking about is the online  
22 application where she fills it out online, and even in  
23 that instance she didn't fill out.

24 **THE COURT:** What do you mean she didn't fill  
25 out? She didn't fill it out accurately?

1                   **MR. MIGLIO:** Right. She said that she had  
2 never been fired from a job by the way, and she didn't  
3 include all of her previous employers.

4                   So -- but in any event, that's the employment  
5 application, but the resume fraud case doesn't stand on  
6 the employment application. There's no prejudice giving  
7 it over to them and using it, but that's part of the case,  
8 and part of the case about her being in positions for a  
9 couple of months and leaving, it's all consistent. It's  
10 no different than her saying, if I had not been terminated  
11 by Ford Hospital, I would have been there for 100 years.  
12 So I should be front pay all the way to the end of time.  
13 So that's what our position is with respect to that.

14                  **THE COURT:** Okay.

15                  **MR. MIGLIO:** And if he wants to take the  
16 deposition of somebody about the application, he is free  
17 to do so, but the fact of her previous employment history  
18 is relevant even without the employment application.

19                  **THE COURT:** Okay. I agree with that last  
20 statement because I think you will be operating without  
21 the application, but the previous work experience is  
22 pretty integral to the case, and the defendant's after  
23 acquired defense, and the inconsistencies between that and  
24 other applications, if those were -- those had been  
25 disclosed as exhibits --

1                   **MR. GRAHAM:** Could I just make one statement?

2                   **THE COURT:** Sure.

3                   **MR. GRAHAM:** I think the issue with the  
4 application is that there are actually words on that  
5 application which say that you could be terminated if the  
6 information is not complete. That's only the place that I  
7 believe those words appear, and if the application is not  
8 coming in, well then there's no indication that the  
9 defendant would have terminated her for any type of  
10 inconsistency on the resume.

11                   **THE COURT:** You don't think we will hear oral  
12 testimony to that effect? So maybe we will and maybe we  
13 won't, and maybe there will be appropriate objections to  
14 questions that are posed from you to that effect, but I've  
15 got to believe that whoever the hiring person is is going  
16 to be offering testimony in the case that she was advised  
17 of that and -- or if not, advised of it through that  
18 application that that is the employer's policy.

19                   So the point is I think that the -- that this  
20 general proposition that her prior work history is  
21 irrelevant, I think is misplaced and is appropriate as a  
22 subject of examination.

23                   Okay. So next we're talking about evidence of her  
24 prior bankruptcy.

25                   **MR. GRAHAM:** We could do that. The next one

1 in order --

2 **THE COURT:** I see. Jeffrey Automotive?

3 **MR. GRAHAM:** Yes.

4 **THE COURT:** Go ahead. I'm sorry.

5 **MR. GRAHAM:** So here there was a lawsuit  
6 which was filed by Ms. Reeser, and it is her understanding  
7 that there was a settlement offered which was made, which  
8 was lower than she wanted, and so the attorney, as often  
9 the case, did not want to continue after she was unwilling  
10 to agree to the settlement offer and decided not to  
11 litigate the claim. She didn't find another attorney. So  
12 the claim lapsed.

13 This is irrelevant. Some of the documents which  
14 are included from the exhibits list are actually  
15 attorney-client privilege documents, communications  
16 between Ms. Reeser and her attorney, but all of it is  
17 irrelevant.

18 In terms of the stated reason for wanting to use  
19 this lawsuit is that apparently a defense to the lawsuit,  
20 the company had claimed that Ms. Reeser had used a company  
21 computer for personal use, and they -- defendant states,  
22 well one of the reasons that Natalie had at one time been  
23 disciplined was for personal use of a computer, but the  
24 defense in this case -- the reason in all of the pleadings  
25 and the summary judgment motion and everything, their

1 claim as to why Natalie was terminated is job abandonment.  
2 It has absolutely nothing to do with using a work computer  
3 for personal use. So admitting evidence of that issue  
4 could give the jury some idea that there is an alternative  
5 defense other than the one and only defense which has been  
6 raised by defendant, that she was terminated for job  
7 abandonment.

8 They raise some issue that this could be a common,  
9 scheme or plan, but in reality, I think they basically  
10 admit in their response that they are attempting to use  
11 this to show that she is litigious, which, of course, is  
12 impermissible. So I think both because it is completely  
13 irrelevant, because it raises a new defense which has  
14 never been raised before, and because it's basically an  
15 attempt to demonstrate that the client is litigious, any  
16 admission of the evidence would be highly prejudicial.

17 **THE COURT:** Okay. Thanks, Mr. Graham.

18 Mr. Miglio?

19 **MR. MIGLIO:** Well, there's a couple of  
20 things.

21 First of all, her employment history with Jeffrey  
22 Automotive is part of the after acquired evidence and what  
23 took place at Jeffrey, and what she told everybody what  
24 took place at Jeffrey is part of our resume fraud, but  
25 secondly, she filed a lawsuit -- and I'm not suggesting

1       that we are going to introduce the motion to withdraw and  
2       all of that -- filed a lawsuit in 2009, two years before  
3       she started working at Henry Ford Health System. It was  
4       an employment case claiming that she was terminated in  
5       violation of public policy and whatever, and lo and  
6       behold, what is she asking for and claiming? That she  
7       suffered mental and emotional distress as a result of her  
8       termination, and that she is entitled to be compensated  
9       for that.

10               One more issue about this plaintiff's mental and  
11       emotional distress is that she sought -- that she sued  
12       another employer claiming that a termination, another  
13       element of her mental and emotional distress caused her  
14       the same kind of damages she's seeking in this case two  
15       years before she came working there.

16               So our position is that the lawsuit is relevant  
17       because it's another incident where she is claiming that  
18       she's suffering a traumatic loss. It goes to what the  
19       jury is going to hear about her here, and that it is  
20       relevant to show that this is a contributing factor, or a  
21       factor in her background about which she sought medical  
22       treatment and for which she sought to be compensated.

23               The circumstances about why she left or under what  
24       circumstances she left is also part of the after acquired  
25       evidence because she lied about that on the resume, but

1 the fact that she filed a lawsuit -- and we've cited cases  
2 to the Court -- shows that she was seeking -- that she  
3 herself admitted through her counsel that she suffered an  
4 event for which she suffered mental and emotional distress  
5 damages in 2009, two years before she started working for  
6 us.

7 So it is relevant. We don't plan on making an  
8 argument that she's litigious to the jury because of two  
9 lawsuits made to some people would be litigious. I mean,  
10 one lawsuit may be litigious, but we don't plan on making  
11 an argument that she's litigious. That would not be  
12 really relevant. We aim to show it on a previous occasion  
13 she claimed mental and emotional distress two years before  
14 she started working.

15 **MR. GRAHAM:** Defense counsel is basically  
16 arguing that it's not that we're arguing that she's  
17 litigious. It's just a common scheme or plan, but you  
18 look at the cases that they actually cite in their brief,  
19 and you see what is it that is a common scheme or plan?  
20 Well, a common scheme or plan is situations where you file  
21 a lawsuit, and in that you doctor evidence, and then in  
22 order to get money from your employer, and then in another  
23 lawsuit, you doctor evidence to strengthen your case, and  
24 this is evidence that you falsified records, and that this  
25 is a habit, and that this shows that there is a common

1 scheme or plan. That's the case they cite in their brief.

2 Here, there's no allegations that Natalie has  
3 engaged in any type of conduct which would demonstrate  
4 some form of common scheme or plan. All they're saying is  
5 well the mere fact that she has alleged a mental anguish  
6 and emotional harm is part of a common scheme or plan.  
7 Well almost every lawsuit, unless it is a simple breach of  
8 contract case that involves employment law, is going to  
9 have usually some form of mental anguish and emotional  
10 suffering.

11 So I don't see how the fact that she has two  
12 lawsuits, both of which allege mental anguish and  
13 emotional harm somehow demonstrates common scheme or plan.  
14 It would not be a common scheme or plan if she filed the  
15 lawsuit, and she was only looking for back pay, but the  
16 fact that she's added these additional damages that she  
17 would like somehow demonstrates common scheme or plan,  
18 that does not make any sense.

19 So it would be our position that obviously this is  
20 just a way to get around saying that we're trying to  
21 demonstrate she litigious by saying well, it's not  
22 litigious. It's a common scheme or plan, and again, it is  
23 highly prejudicial because it's going to demonstrate to  
24 the jury that she's the type of person that might bring  
25 lawsuits, and really we're talking about two lawsuits in

1 her life. Even if it was to prove she was litigious, I  
2 don't think it would prove that. So I think it is  
3 completely inappropriate.

4 **THE COURT:** Okay. Well, I think the prior  
5 work history again is a significant subject of the case,  
6 and I tend to agree first, that it is not -- this  
7 experience at Jeffrey Automotive does not constitute  
8 404(b) evidence as argued by the defense. However, the  
9 resume fraud after acquired evidence issue is an  
10 appropriate subject for development with testimony, and  
11 the fact that she claimed emotional distress in her --  
12 arising out of the termination, the fact that she was  
13 terminated is involuntarily is obviously admissible. The  
14 fact that she claim to have experienced emotional distress  
15 and required treatment is admissible, again, because the  
16 jury is going to be expected to award damages if they find  
17 liability in this case for the termination, and the impact  
18 that this termination had on her, and separate that out,  
19 if possible, from the emotional distress and the treatment  
20 that she was receiving, including the meds that she was  
21 taking in relation to the termination from Jeffrey which  
22 occurred shortly before.

23 So in general, I'm going to grant in part and deny  
24 in part the motion. The part of the motion that is  
25 granted is that -- is the testimony about -- the potential

1 testimony about why she was terminated, and the  
2 circumstances of the termination, and the Court would  
3 entertain and give a curvative instruction. The testimony  
4 includes that she filed a lawsuit asserting emotional  
5 damages arising out of that termination. The import of  
6 the curvative instruction would be that they may not  
7 conclude from that testimony that she is a litigious  
8 person or -- and they have to separately consider in this  
9 case the reasons for the termination.

10 So if they don't hear any testimony about the  
11 reasons for termination, and they -- unless, of course,  
12 the plaintiff herself wants to offer that testimony in  
13 which case it opens it up, the -- and the curvative  
14 instruction is this isn't to offered to demonstrate any  
15 propensity on her part to engage in litigation, then that  
16 should cure the harm -- the potential harm of the jury  
17 concluding that she is litigious.

18 Okay. So next is the bankruptcy.

19 **MR. GRAHAM:** So we had originally submitted a  
20 motion in limine because it was our understanding that  
21 opposing counsel was interested potentially in using  
22 plaintiff's 2011 bankruptcy to demonstrate some type of  
23 motive or litigation, because that is often how  
24 introducing testimony related to having a bankruptcy is  
25 attempted to be used, and in response, opposing counsel

1 states that, in fact, this is not at all the intent, that  
2 has nothing to do with motive for the lawsuit, which is  
3 great, because from our perspective that is conceding the  
4 point that it's improper to use bankruptcy evidence as  
5 evidence of motive to file a lawsuit. But instead they  
6 say, we do intend to use it, but we intend to use it to  
7 demonstrate that it is an alternative source of emotional  
8 harm, and there is no real evidence that the bankruptcy  
9 has caused Ms. Reeser emotional harm.

10 Nowhere in her deposition does she say that she  
11 was harmed by her bankruptcy, and even the deposition that  
12 we recently took, opposing counsel asked her treating  
13 counselor, well has she ever mentioned problems with money  
14 as a basis of having some type of emotional difficulty,  
15 and the treating counselor said no, she hasn't. So  
16 there's no relevant evidence to demonstrate that  
17 bankruptcy would be something which has caused her  
18 emotional harm.

19 In the brief we cited the case of EEOC versus New  
20 Breed Logistics where -- in the reply actually -- that  
21 case where a defendant was attempting to use bankruptcy as  
22 proof of an alternative source of emotional harm, and  
23 court said it is completely irrelevant.

24 I think it is the same here because there's  
25 nothing which is established that her bankruptcy would be

1 relevant to emotional harm, and at the same time there is  
2 significant danger that even if they don't introduce it as  
3 motive, the jury could take it as motive, and so I think  
4 it should be properly excluded.

5 **THE COURT:** Thanks, Mr. Graham.

6 **MR. MIGLIO:** Two reasons: First of all, this  
7 is a bankruptcy that was filed in 2011. She was  
8 discharged in 2011. It is a possible and probable issue  
9 for financial stress that she went through bankruptcy at a  
10 time when she was working at Henry Ford Health System.  
11 There's going to be no argument among anybody that having  
12 to go through bankruptcy because you're financially  
13 distraught is a source of stress.

14 She is going to argue as we've seen that she, as a  
15 result of losing your job, she suffered some financial  
16 distraught and distress, and the bankruptcy shows that  
17 this was already in place long before that, that this was  
18 a circumstance that was completely unrelated to Henry Ford  
19 Health System, with the exception, of course, that one of  
20 the biggest debts that she had in bankruptcy was Henry  
21 Ford Health System for all of the medical care she got for  
22 which she didn't pay for.

23 But the issue with respect to the bankruptcy is  
24 that this occurred close in time. She's got testimony now  
25 that she moved because she couldn't afford her house that

1 she was living in, that she had to go up north to pursue a  
2 less paying job. So in the overall scheme of things, the  
3 fact that her financial condition was such as it was, is  
4 completely relevant to the claim that all of this  
5 financial loss that she allegedly suffered as a result of  
6 terminated, and that she suffered mental and emotional  
7 distress is all relevant to what the jury is going to be  
8 asked to reward her in the way of financial compensation  
9 for losing --

10 **THE COURT:** Is this Chapter 17 or 7?

11 **MR. MIGLIO:** It was one where -- I'm not a  
12 bankruptcy lawyer -- you get discharged right at the end,  
13 no payments. You're just released. I think that's  
14 Chapter 13. I'm not sure. Do we know? I can find out.

15 **THE COURT:** When did the discharge occur?

16 **MR. MIGLIO:** 2011.

17 **THE COURT:** She filed in August of 11, and it  
18 was completed before the end of the year?

19 **MR. MIGLIO:** Yes, I believe so, your Honor.

20 **THE COURT:** Okay. Do you know Mr. Graham  
21 whether it was 13 or 7?

22 **MR. GRAHAM:** I do not, your Honor.

23 **THE COURT:** It sounds like it had to be a 7,  
24 but -- well, I think the fact of her bankruptcy proceeding  
25 is -- maybe relevant by her testimony, I generally

1 think --

2 **MR. GRAHAM:** Could I address that, your  
3 Honor, just briefly?

4 **THE COURT:** Yes.

5 **MR. GRAHAM:** The testimony that opposing  
6 counsel mentions where she has to go up north because  
7 she's run out of money is an event that occurred after  
8 termination from Henry Ford. She had no money because she  
9 was fired. She had attempted to continue to live in the  
10 southeastern Michigan area.

11 **THE COURT:** She broke up with the boyfriend  
12 or something, lost his income.

13 **MR. GRAHAM:** Correct. There were two of them  
14 living in the same apartment each paying rent. She was  
15 fired. She lost her income. They split up. There was no  
16 way to pay the rent. So she attempted to find cheaper  
17 housing and assistance from family.

18 To say that we should be able to use her financial  
19 stressor as a result of the bankruptcy, because she says  
20 in her testimony that she experienced financial difficulty  
21 because she had to move up north, makes no sense, because  
22 the bankruptcy occurred in 2011. She was discharged in  
23 2011, and she fired in 2013 -- or 2014.

24 **THE COURT:** Okay. I was in the process of  
25 announcing a ruling that there might be some circumstances

1 where this would become relevant, but on its face it  
2 appears to be irrelevant. The Court will generally grant  
3 the motion to the extent that I will not permit any  
4 questions designed to elicit that testimony, absent some  
5 approval in advance.

6 So I would expect counsel to approach to indicate  
7 now have this answer, this is why I should be able to put  
8 it in before it goes in, okay?

9 **MR. GRAHAM:** Thank you.

10 **THE COURT:** Let's take a five minute break.

11  
12 (Recess taken.)

13  
14 (Proceedings resumed.)

15  
16 **THE COURT:** Mr. Graham, you have one more?

17 **MR. GRAHAM:** So the last issue that we're  
18 dealing with is whether or not defendant can present  
19 evidence that Ms. Reeser had engaged in some form of a  
20 HIPAA violation, and here I think it's helpful to give  
21 some background as to where these documents came from and  
22 where they went.

23 Ms. Reeser was emailed documents in the ordinary  
24 course of her business as an employee at Henry Ford, and  
25 when she began having issues with Fiona Bork, as you might

1 recall from the motion for summary judgment and various  
2 other motions in this suit, she contacted Jill Hood who  
3 was the H.R. representative, and Natalie did not work at  
4 central hospital where Ms. Hood worked. She worked at the  
5 Clinton Township office. So in order to see Ms. Hood, she  
6 had to drive to Ms. Hood.

7 She took with her some of the documents which had  
8 been provided in the ordinary course of business to  
9 provide to Ms. Hood as part --

10 **THE COURT:** Some of the documents or some of  
11 the files?

12 **MR. GRAHAM:** Well, most of them I believe are  
13 emails, and what it dealt with was the dispute between  
14 Fiona Bork and Natalie, in terms of Natalie's belief that  
15 Fiona Bork was targeting her, and she wanted to provide  
16 this evidence to Ms. Hood. She walked into Ms. Hood's  
17 office with the documents, and handed them to Ms. Hood and  
18 said, here are the things that support my claim, and Ms.  
19 Hood said, I don't want the documents, and so Natalie took  
20 the documents back, placed them in her car and drove back  
21 to Clinton Township. The documents remained in her  
22 vehicle until she was suspended a short while later.

23 After she was suspended, she still had the  
24 documents in her possession because they were in the  
25 vehicle, and she provided them to our office. We received

1 the discovery request for any documents related to Ms.  
2 Reeser's time at Henry Ford, and we provided the documents  
3 in discovery.

4 The issue here is whether or not this is a HIPAA  
5 violation which could be used as after acquired evidence  
6 that she should be terminated, and first thing that I will  
7 say is I think we laid out in the brief how courts have  
8 looked at this issue, and basically the idea being that if  
9 you come across documents in the ordinary course of  
10 business, you don't go searching for them, and here  
11 defendant's manager emailed the documents to her, and then  
12 you only disclose it to your attorney, and your attorney  
13 discloses it in discovery. Well, that's not really an  
14 issue, and that's exactly what happened here, and that's  
15 what Kempcke, Womack and Quinlan discuss.

16 It has not been disclosed to -- we have not  
17 disclosed it to anyone other than defendants. She has not  
18 disclosed it to the general public. This is just  
19 documents that she had to transmit to Hood. She got fired  
20 or suspended. She transmitted those documents to us and  
21 we provided them as requested.

22 Two things are important. I think we've cited  
23 some cases which provide guidance on how this issue should  
24 be decided, and the defendant doesn't really cite any case  
25 law for the proposition that that is the incorrect way to

1 analyze this issue.

2 The only thing that they argue is that they  
3 did not-- she did not come across these documents  
4 innocently. That is what is stated in the response, but  
5 there's no evidence that she didn't come across the  
6 documents or in the ordinary course of business. They  
7 were all emailed to her by her supervisors.

8 Another important issue is the argument of well,  
9 okay. Even if this was some type of violation --

10 **THE COURT:** Why would they email to her in  
11 the first place?

12 **MR. GRAHAM:** As part of her job. So for  
13 instance, there was a patient who has, I guess, been  
14 badgering her, and so she contacted Fiona Bork and said  
15 this patient has been badgering me, and Fiona Bork wrote  
16 back and said, thanks for letting me know, but didn't  
17 identify the patient's name. That's one instance.

18 **THE COURT:** You said badgering?

19 **MR. GRAHAM:** Well, I don't know if it was  
20 badgering. It was some type of creepy behavior.

21 There was another one where a patient had said  
22 that Natalie had done a good job, and wanted to  
23 communicate this, and send it to Fiona Bork, and Fiona  
24 Bork gave to it Natalie.

25 So the documents -- some of the documents I

1 believe relate to Natalie's taking of blood and working  
2 with different patients, either having problems or not  
3 having problems or compliments related to the taking of  
4 blood.

5 Natalie didn't -- it's not like Natalie published  
6 these documents or used these documents in a malicious way  
7 to blackmail the patients. She had the documents because  
8 they were sent to her. She tried to give them to a Henry  
9 Ford manager who rejected them, and then she was fired,  
10 and she turned them over to her attorneys, who turned them  
11 over in a discovery request.

12 If you look at the policy -- and both defense  
13 counsel and us cite to the Systemwide Corrective Action  
14 Program, H.R. Policy Number 5.17, and if you look there,  
15 they have three different categories of what happens when  
16 you disclose patient information, and one of them is if  
17 you disclose the information with knowledge and approval,  
18 one is if you disclose the information without knowledge  
19 and approval, and one is if you maliciously use and  
20 disclose the information.

21 If you do it with knowledge and approval, the  
22 discipline is suppose to be written warning, policy  
23 reeducation.

24 If you do it without knowledge or approval, you  
25 should receive written warning with suspension, policy

1 reeducation.

2 If it's malicious use, then it could be  
3 termination, but here malicious use is that you're  
4 disclosing the information in a malicious and harmful  
5 manner, or you're doing it to somehow gain a benefit.

6 Here the only use that she has used it for is to  
7 disclose the information related to her dispute with Fiona  
8 Bork. This is not a malicious disclosure of patient  
9 information, and certainly she didn't benefit. So at the  
10 most this would be a group two disclosure without  
11 knowledge or approval, which would require a written  
12 warning or suspension or policy reeducation.

13 And so the argument is one, this is not an issue  
14 that should be allowed in under HIPAA through the analysis  
15 that we provided, and which no cases have been cited  
16 contesting that, and simply the argument comes down to was  
17 it an innocent acquisition, and we're arguing well, how is  
18 it not an innocent acquisition if she didn't -- if she  
19 received emails from her managers, but even saying that's  
20 not true. Say this was some type of violation, well,  
21 okay. We have a guide. We've both cited to it.

22 It is obvious that if anything, this is a  
23 disclosure without knowledge and approval which gives you  
24 a written warning with suspension or policy reeducation.  
25 It does not lead to termination.

1           And so obviously any implication not only is this  
2 something which could be used to justify a termination, I  
3 think one, it paints her in a bad light as a professional  
4 as someone who is willy-nilly giving out patient  
5 information, and two, it is an alternative reason argued  
6 for termination that does not fly or does not mesh with  
7 the Systemwide Corrective Action Program, and for those  
8 reasons we think it should be excluded.

9           **THE COURT:** All right. Thanks, Mr. Graham.

10           **MR. MIGLIO:** Well once again, we've attached  
11 a copy of the corrective action policy which provides for  
12 termination in the event an employee takes medical  
13 information, whether it's in hard copy form or discloses  
14 medical information, and whether or not it's for the  
15 employee's benefit or whether it's removed from the  
16 premises, I mean, those are terminable offenses under  
17 Henry Ford Health System policy, and we will have  
18 testimony that says that what the plaintiff did in this  
19 instance was a terminable offense.

20           Now, you know, he's just arguing the merits of a  
21 claim that she should not be discharged, but the bottom  
22 line is when we got these records that were not redacted,  
23 that had patients' names on them that were produced in  
24 discovery, it really doesn't matter what she did.

25           Obviously she was in a remote site. So the

1 patient information is transmitted over their secured  
2 computer system. She had access of that in the course of  
3 her employment, drawing blood from patients. Whether she  
4 should have taken to human resources and whether she did  
5 is another issue, but taking them from Henry Ford Health  
6 System, showing them to her attorneys with patient  
7 information on them, I mean -- or disclosing them, all of  
8 that is strictly prohibited, and grounds for termination.

9 Henry Ford Health System, like all health care  
10 institutions, have an absolute duty to protect patient  
11 confidentiality, and producing them in a lawsuit or  
12 showing them to a lawyer, doesn't get you by that.

13 She should have never had these records. She  
14 should have never kept them. When she met with Jill Hood,  
15 it was on January 20th, she had them in her car for  
16 several weeks because she not suspended until a month  
17 later. So there's no excuse, and again, this goes to  
18 another element of the health system's after acquired  
19 evidence. The policy is specific. We'll have testimony  
20 that people are terminated for these kind of violations.

21 **THE COURT:** So why isn't it just a question  
22 of fact, Mr. Graham? Whether this particular -- I'm  
23 gathering if there's testimony from other administrators  
24 within the hospital that it is terminable conduct,  
25 wouldn't that be left to the jury make the choice?

1                   **MR. GRAHAM:** I don't believe so. Again, the  
2                   only cases that we have discussed are the cases that we've  
3                   presented, and the cases that we've presented state that  
4                   if you acquire these documents innocently or in the  
5                   ordinary course of your business, and you disclose them  
6                   only to your attorney, this is protected activity, that  
7                   this is not illegal activity. As a matter of law, she is  
8                   not engaging in conduct which would be a HIPAA violation.

9                   **THE COURT:** What about the conduct of keeping  
10                  these documents in her car for weeks before they were  
11                  delivered to you?

12                  **MR. GRAHAM:** Well, you know, what I can say  
13                  to that is throughout this time, Natalie was dealing with  
14                  retaliation from Fiona Bork, and she was in regular  
15                  correspondence with Jill Hood in terms of attempting to  
16                  resolve the matter, get paid the lunches that she was  
17                  owed, and was promised to be paid and was never paid until  
18                  after she was fired.

19                  Her only resource in dealing with this issue was  
20                  Jill Hood. Even after speaking with Jill Hood the first  
21                  time in January, she continued to try to speak with Jill  
22                  Hood. She continued to try to transmit information and  
23                  meet with Jill Hood.

24                  So the fact that the documents remained in her  
25                  car, I think, if anything, could be seen as she wants to

1 continue to present this information as evidence that  
2 Fiona Bork is retaliating against her, and the only way to  
3 present that information is to go back to Jill Hood and  
4 attempt to present the information.

5 In terms of whether or not she should have left  
6 them in the car, again, I don't know whether or not it  
7 should have been left in the car, but what I can tell you  
8 is that the only transmittal of the documents was from her  
9 employers to her, from her attempted to deliver to Jill  
10 Hood, Jill Hood did not accept them, went back to Clinton  
11 Township as she continued to try to contact Jill Hood and  
12 she was fired, and they were sent to her attorneys, which  
13 were turned over in disclosure.

14 In that chain of events, there was no time when  
15 there is an improper disclosure, and so regardless of what  
16 the employer's position would be, it would not be a HIPAA  
17 violation.

18 So I think maybe there's some type of an issue if  
19 that wasn't the law, and the law was this could be a HIPAA  
20 violation, and then we would get into an issue of what  
21 does the policy say? Well, the policy clearly states that  
22 you don't fire someone for something like this. Could you  
23 have an employer come in and argue that this is now not  
24 the case? Well, that would be contrary to all of the  
25 established policies.

1           So I think one, even without getting to the policy  
2           as a matter of law, this is not a violation, and it is  
3           highly prejudicial. It is something, which if introduced,  
4           you're basically saying this is an individual who does not  
5           care about her patients. This is an individual who could  
6           have been terminated at anytime, and I think it  
7           establishes a bit of an issue, because the cases that are  
8           available now that have ruled on this issue have said, you  
9           can give this to your attorney, and as long as you give it  
10          to the attorney, and it's turned back over to the party  
11          that you took it from in discovery, this is not a  
12          violation.

13           If you were to rule in the opposite direction,  
14          basically it would be saying is well, that's not quite  
15          true even in situations where you only provide the  
16          information to your attorney, that could constitute a  
17          violation, and I think that is a dangerous precedent,  
18          because then you can't have the same type of  
19          attorney-client relationship where you could disclose  
20          documents without fear of some type of after acquired  
21          evidence argument preventing you from recovering full  
22          damages that you would need in your case. That's an  
23          important relationship, and I think the Court should  
24          recognize that.

25           **THE COURT:** Okay. Thank you.

1 Well, much of the discussion here assumes --  
2 assumes testimony describing the conduct as perhaps  
3 without the consent of the patient, but without malice.  
4 Malice is I'm assuming going to be the subject of the  
5 testimony. I have a proffer, if you will, from defense  
6 counsel that the witnesses from Henry Ford are going to  
7 claim that it is terminable conduct. Obviously, the  
8 plaintiff takes a different view of it, and one really  
9 can't conclude from what's been presented here so far that  
10 it is -- that it is one or the other. That's what the  
11 jury is here for.

12 If it turns out that the Court finds the testimony  
13 from the defense insufficient to allow a reasonable fact  
14 finder to conclude that this was terminable conduct, then  
15 I can entertain a motion to that effect and make that  
16 ruling before it goes to the jury, but the Court finds at  
17 this juncture the motion is premature, and should be  
18 denied.

19 Okay. So we have defendant's motions.

20 **MR. MIGLIO:** Your Honor, we have three  
21 motions, and I know we heard a lot about medical and  
22 psychological conditions, so I will brief.

23 We don't object to the plaintiff testifying about  
24 how she felt when she was terminated. We don't dispute  
25 the law that says that she doesn't need expert testimony

1 or treating testimony in order to establish a claim for  
2 mental and emotional distress.

3 What we do dispute is her ability to testify about  
4 a diagnoses that she has depression or that she has  
5 schizophrenia or has anxiety. We dispute that because  
6 that's a diagnoses that left for a treating psychologist  
7 or expert.

8 We dispute that her ability to testify that any  
9 diagnoses is what she is related to her termination  
10 because that is also subject of expert testimony.

11 We also dispute that she can testify that she's  
12 prescribed certain medication to take care or treat  
13 certain conditions because in the absence of showing that  
14 those conditions were caused by Henry Ford Health System,  
15 it is irrelevant that the doctors are prescribing  
16 something for it.

17 We also dispute her ability to repeat what doctors  
18 have told her diagnoses, how long it is, how long it  
19 should be, and anything else that came out of the doctor's  
20 mouth, including that she was getting increased medication  
21 as a result of what the doctor saw and what the doctor  
22 felt needed.

23 But we don't dispute -- and I think reading  
24 opposing counsel's brief -- we don't dispute that she  
25 can't tell the jury that she was upset, that she was

1       embarrassed, humiliated and all of that other stuff. She  
2       just can't talk about what the doctors told her or make  
3       diagnoses or talk about the severity, extent or cause of  
4       any sort of mental or psychological condition.

5                   **THE COURT:** Mr. Graham?

6                   **MR. GRAHAM:** So first thing that I would say  
7       is if the Court is inclined to rule in favor of the  
8       defendant, it would really be proper to reserve judgment,  
9       because as we've discussed, there is a deposition that was  
10      conducted by a treating medical provider in which she  
11      clearly states that anxiety and depression are caused by  
12      plaintiff's termination from Henry Ford.

13                 So excluding all evidence when there's going to be  
14      a motion very shortly seeking to introduce this, I think  
15      it makes sense to reserve judgment, but I think the motion  
16      simply be denied because as we cited in the numerous,  
17      numerous cases that we have provided, especially Leonard  
18      versus Compton, it states that expert medical testimony is  
19      not essential to forge the causal connection between a  
20      traumatic event and the alleged serious emotional  
21      distress.

22                 So causation is not really an issue, and in many  
23      of the other cases that we cite also discusses situations  
24      in which plaintiffs are allowed to testify about the  
25      medication they are taking, and why are they taking that

1 medication. They are able to testify that they've  
2 experienced anxiety, stress and depression. They are able  
3 to state that they have sought help from physician.

4 Those cases where defendant kind of talks about  
5 not being able to establish causation, you're really  
6 dealing with a situation -- I think there was one case  
7 where the plaintiff was arguing that somehow their bones  
8 had grown or become more soft as a side effect of a  
9 medication. Certainly in that type of situation, I think  
10 you're dealing with a fairly complex medical situation  
11 where maybe it's not appropriate to allow someone to talk  
12 about their anxiety or depression.

13 But witnesses are allowed to testify to the same  
14 understanding that a lay juror could, and I think anxiety  
15 and depression are things that people understand, that  
16 they understand when they are depressed, they understand  
17 when they are anxious. They certainly can go to a doctor,  
18 and I don't think there is any problem with her saying, I  
19 went to a doctor. I was prescribed medication. I started  
20 taking Zanax.

21 And it seems to be on the one hand the defendant  
22 is saying, well, we're not trying to prevent her from  
23 talking about her conditions except as to the extent,  
24 causation, the depth, but that's basically everything.  
25 It's basically everything that relates to her condition,

1 and the cases that we've presented have said, she can talk  
2 about causation. She can talk about medication, and she  
3 can be awarded damages simply based on her own testimony  
4 to that effect.

5 More importantly, I think -- well, perhaps just as  
6 importantly, if you were inclined to grant their motion,  
7 obviously we have a deposition from a treating provider  
8 that may be admitted, and it directly states that her  
9 emotional harm is related to her termination from Henry  
10 Ford, and that she is taking medication as a result of  
11 that, I would ask that the Court reserve judgment.

12 **THE COURT:** All right. Thank you.

13 **MR. MIGLIO:** Your Honor, I'm very, very  
14 troubled by the suggestion that this testimony, this  
15 deposition or this counselor's testimony would come in.

16 We were at final pretrial conference before the  
17 Court on January 19th. At that time opposing counsel  
18 said -- disclosed for the first time that their client had  
19 been seen by a therapist. You said to them, you have two  
20 weeks to file a motion to bring this witness in or to use  
21 this witness, and you should also supplement the  
22 discovery. There has not been any activity to raise an  
23 issue that they would be able to use a deposition, that  
24 they would be able to call a witness this late in the  
25 game, and the suggestion in the next week or so, he's

1 going to move to bring in her deposition or have her  
2 testify is --

3 **THE COURT:** Okay. Thanks.

4 **MR. MIGLIO:** Okay.

5 **THE COURT:** That's not going to happen. It's  
6 obviously way too late to be adding an expert witness who  
7 has not written a report, who hasn't -- it just not going  
8 to happen.

9 So as it relates to this motion, the Court is  
10 going to permit her to talk about her medicines, what she  
11 received. The Court will permit her to describe her own  
12 distress, and what motivated her to go to the doctor and  
13 why the distress that she's experienced is attributable to  
14 her termination. Those are all obviously appropriate  
15 areas of examination to be permitted.

16 The statements made by the doctor, generally not  
17 going to be admissible as hearsay, and will -- so to the  
18 extent that the plaintiff would be seeking to talk about  
19 what the doctor told her is generally going to be  
20 excluded.

21 It is a little difficult -- this is another one of  
22 those motions that is going to depend in part on how the  
23 evidence is going at the time that question is asked,  
24 which might elicit a doctor's statement, but as a general  
25 proposition, those would not admissible.

1           So again, the Court will deny the motion as -- by  
2           the issuance of a hard and fast prohibition, but hopefully  
3           you understand the scope of what is and what isn't from  
4           what I indicated.

5                   **MR. MIGLIO:** Are you granting in part and  
6           denying in part?

7                   **THE COURT:** Yes, I guess I'm granting part  
8           and denying part.

9                   **MR. MIGLIO:** So she can talk about her  
10          feelings, and I think you said --

11                   **THE COURT:** Why she sought treatment, what  
12          she -- what motivated her to seek treatment, and what meds  
13          she was prescribed.

14                   **MR. MIGLIO:** But -- I don't want to reargue  
15          the issue -- but by saying what meds she was prescribed,  
16          unless there's testimony that says she was prescribed  
17          these meds for symptoms she was experiencing, which there  
18          wouldn't be, that's the hearsay aspect of -- and allowing  
19          the jury to imply from that that she's receiving  
20          medication as a result of these circumstances, these  
21          conditions which we don't have testimony about.

22                   **THE COURT:** Well, she said I went to the  
23          doctor because I was waking up in the middle of the night  
24          trembling with anxiety about my termination, and my -- so  
25          I went to the doctor. So far there's nothing wrong.

1                   **MR. MIGLIO:** Right.

2                   **THE COURT:** And she says, as a result of my  
3 appointment with the doctor so and so, I received a  
4 prescription for Zanax, and I took it, and it helped a  
5 little bit, but not enough to make a big difference.  
6 Nothing wrong.

7                   **MR. MIGLIO:** Why wouldn't that be hearsay,  
8 the fact that the doctor prescribed that medication for  
9 her condition?

10                  **THE COURT:** Well, because she's going --  
11 you're suggesting that she can't say I got Zanax and took  
12 Zanax?

13                  **MR. MIGLIO:** Well, if she's saying the doctor  
14 prescribed Zanax, that's hearsay, and that suggests to the  
15 jury the doctor did it for a reason, and that the  
16 medication -- the reason it was prescribed is as a result  
17 of causation. Doctor saw this and prescribed it.

18                  She says, I'm depressed. I went because I was  
19 depressed. Boom. The doctor prescribed Zanax for my  
20 depression, suggesting that it needed to be treated. It's  
21 all hearsay. It brings in the doctor's verification of  
22 what she said.

23                  If you said you were on psychotropic medication,  
24 unless it has something to do with what the case was, the  
25 jury would not care. We don't have a doctor to cross

1       examine as to why he prescribed it. He could have  
2       prescribed Zanax for some other--

3               **THE COURT:** Presumably you have medical  
4       records if they contradict what she says?

5               **MR. MIGLIO:** Well, we have medical records  
6       that contradicts the dosage that she claims she got. We  
7       don't have a doctor on the stand to say, isn't it true you  
8       prescribed it because she was telling you of whatever  
9       reasons she needed the medication. That's the point.

10              **THE COURT:** Well, I still don't -- I don't  
11       know why she would be barred from testifying about what  
12       medication she is taking for the anxiety that she  
13       suffered.

14              **MR. MIGLIO:** Because that would only be  
15       relevant if it was for a condition that she was claiming  
16       my client should compensate her, and without that  
17       connection, it should not be relevant, and it goes to show  
18       that a doctor looked at me and said, yeah, I am really in  
19       need of medication, and that this medication is for what  
20       I'm claiming to the jury I went to see the doctor for.

21              You're allowing her to substitute the  
22       prescription, which I believe would be a hearsay  
23       statement, or the fact that the doctor is going to get on  
24       the stand -- which there is no possibility of that -- and  
25       say, I saw her yes. She was upset, and yes, I prescribed

1 medication for it.

2 **THE COURT:** I don't think furnishing a  
3 prescription -- she can attribute what she -- she can  
4 certainly talk about what she told the doctor for purposes  
5 of obtaining medical intervention, and she can testify  
6 what the treatment, which would include medications that  
7 were prescribed, and the jury is free to accept that  
8 testimony or not. They can -- they can choose to reject  
9 it because they think she's -- she's describing symptoms  
10 she really didn't have, but I don't see them making any  
11 conclusions about the -- about what the doctor's view of  
12 that treatment session or treatment session was with the  
13 plaintiff, especially after all of the evidence that you  
14 intend to put in about her.

15 **MR. MIGLIO:** I'm only saying if she gets on  
16 the stand and says she's very upset, really distraught,  
17 felt I was depressed and anxious, and I went to the doctor  
18 and told the doctor that, and the doctor gave me  
19 150 milligrams of Paxil to treat my depression, and who  
20 takes 150 milligrams of Paxil unless you're really  
21 depressed? So the fact that the doctor wrote the  
22 prescription, prescribed it for that, that's all hearsay  
23 in my mind.

24 **THE COURT:** Okay. I'm not persuaded.

25 **MR. MIGLIO:** Okay.

1                   **THE COURT:** I mean, I think the -- especially  
2                   for jurors in this day and time, I don't think they take  
3                   anything away from the -- they certainly don't have --  
4                   don't reach any conclusions about the doctors diagnosis or  
5                   his -- the fact that he gets a prescription. Everybody  
6                   goes in and asks for prescriptions, and she might have  
7                   very well asked him for the prescriptions because she saw  
8                   it on television the night before.

9                   **MR. MIGLIO:** I have a pretty good bet that's  
10                  not what the testimony will be.

11                  **THE COURT:** I'm sure not.

12                  **MR. MIGLIO:** Well, I kind of thought we  
13                  resolved this issue at the joint final pretrial that she  
14                  would not be able to substitute her testimony of that  
15                  treating physician, and this is allows her to do that.

16                  **THE COURT:** Well, to the slightest degree I  
17                  would say. Okay.

18                  **MR. MIGLIO:** All right. So next motion is  
19                  the issue of punitive damages, and I think that the Snapp  
20                  decision by the 11th Circuit is -- I mean, if the Court  
21                  has read the two decisions Snapp and Travis, Travis is  
22                  like a paragraph that says, based on the language of  
23                  216(b), it's for the Court to determine what are legal and  
24                  equitable relief.

25                  The Snapp decision which has been followed by a

1 number of district courts, follows the statutory  
2 construction that says, you know, in 1977 when Congress  
3 amended the statute to provide for anti-retaliation  
4 remedies, Congress knew full well and amended other  
5 statutes to include punitive damages. They didn't do so  
6 in this instance.

7 If you look at the statutory scheme, it's all  
8 compensatory with the exception of where an employer's  
9 activity is willful and then there is some punitive  
10 measures available, this follows the interpretation of  
11 Section 626 of the ADA, where the courts have concluded  
12 the same thing, that there is no punitive damages  
13 available under the ADA, which borrows the same language.

14 And so the argument is that this claim for  
15 punitive damage is not allowable under that Fair Labor  
16 Standards Act, and again, counsel takes some great  
17 liberties suggesting that the Eastern District court cases  
18 allow it.

19 Well, in one case they looked at it and there was  
20 a split of authority, and so for now we're going to let  
21 it, and Judge Levy in a case was evaluating the  
22 enforceability of an arbitration agreement which excluded  
23 punitive damages, and found that was a knowing and  
24 voluntary waiver, and that punitive damages were not part  
25 of the arbitration case.

1           There's nothing in 6th Circuit law that suggests  
2           it. In fact, the 6th Circuit cases that we cited on other  
3           areas of statutory construction would support the 11th  
4           Circuit's ruling that punitive damages in a Fair Labor  
5           Standards Act retaliation case are simply not available  
6           and should not be available in the absence of Congress  
7           enumerating such relief in the statute.

8                     **THE COURT:** Okay. Thanks.

9                     **MR. GRAHAM:** I think first I would say, I  
10          don't think that I have taken liberties. I think this is  
11          exciting. I think this is something new which we're  
12          arguing over right now, but I think it's fair to say that  
13          other district court judges in the Eastern District of  
14          Michigan have at least discussed this issue before, and  
15          that those judges had indicated that it's a situation  
16          where broader remedies maybe available for violation of --  
17          I mean, the exact language, broader remedies are only  
18          available for violations of FLSA's anti-retaliation  
19          provision.

20                 So I think there's at least if not ruling on it,  
21                 an inclination to entertain that. That is something which  
22                 a party could ask for.

23                 I think if you look just at -- well, starting with  
24                 public policy, it doesn't really make sense to prohibit  
25                 the punitive damages. You look at the FLSA, and you see,

1       you know, it is not just compensatory. Whenever you talk  
2       about retaliation provision in the law, whether or not it  
3       is a whistleblower law or reporting discrimination,  
4       punitive damages are something which are readily  
5       available. They are available because there needs to be  
6       some indication to the employer, not just that they  
7       violated nonpayment of lunches or not correct payment of  
8       wages, but because they did something wrong. They did  
9       something wrong, which was retaliating against someone for  
10      raising their legal rights, and in those situations we  
11      generally recognize that punitive damages are appropriate  
12      to deter this type of conduct in the future.

13               I think especially Southerland kind of gets to  
14      that point. Looking at the statute itself, the statute  
15      says that plaintiffs are entitled to equitable and legal  
16      relief, and as Travis states that this amendment really  
17      kind of demonstrates that plaintiffs are able to request  
18      damages without limitation. It doesn't make sense to have  
19      the amendment if there wasn't a change in the FLSA at that  
20      time.

21               Sines I think -- one of the cases that we cited --  
22      goes into pretty good depth about why other  
23      interpretations limiting damages are incorrect, and that  
24      they are really failing to look at any Congressional  
25      intent that would restrict damages in any way.

1 Franklin is another case that we discuss, where  
2 it's noted that there is a general -- when there is a  
3 general right to sue, you are entitled to just about any  
4 remedy which is available, and this is a situation where  
5 there is a general right to sue.

6 We understand that circuits have disagreed, but I  
7 think the stronger analysis is the analysis which allows  
8 the punitive damages, and although you might be the first  
9 judge that would suggest that this is the case in the 6th  
10 Circuit, the other district court judges which have  
11 approached this issue, not only in the 6th Circuit, but  
12 specifically in the Eastern District of Michigan, have  
13 seem to indicate that the proper approach is to follow the  
14 guidance of the courts that have found that punitive  
15 damages are available.

16 **THE COURT:** Okay. Thanks.

17 The Court is going deny this motion. I recognize  
18 that there is a split of authority. The 7th Circuit says  
19 that the punitive damages are appropriate, and the 11th  
20 Circuit says they are not, and the only court actually  
21 within the 6th Circuit to make a ruling on this is a  
22 district court in Tennessee that I don't think either side  
23 cited, but that court held that punitive damages are  
24 recoverable.

25 I'm not prepared to say that they aren't, except

1       they may not be based on the testimony as it's presented.  
2       So this is something that will relate to what instructions  
3       are given to the jury. Really, along with the only other  
4       issue that is before the Court to decide today, this is  
5       probably best decided in the context of a summary judgment  
6       motion, but at this point it might be decided as a matter  
7       of judgment as a matter of law at the end of the trial,  
8       and before instructions are given to the jury.

9               The Court is going to similarly dispose of the  
10       defendant's motion to strike the plaintiff's claim for  
11       back pay. I think that too is an issue that would --  
12       should have been presented perhaps as part of a summary  
13       judgment motion in the case.

14              The real issue is, I think as it relates to that,  
15       the question of mitigation damages, and whether there  
16       was -- and will reach that crossing at some point during  
17       the trial when I'm sure I'll hear the defendant argue that  
18       there is insufficient evidence supporting a finding that  
19       the plaintiff properly sought to mitigate her damages in  
20       the case, and will seek a ruling as a matter of law on  
21       that question, which may affect back pay. It may only  
22       affect front pay, but as I say, we'll get to it at the  
23       appropriate juncture of the trial.

24              So I think that's it. Thank you, both.

25              **MR. GRAHAM:** Thank you, your Honor.

1                   **MR. MIGLIO:** I had one -- I was a little bit  
2 clear when I went back and thought about the motion with  
3 respect to the employment at Jeffrey Automotive and the  
4 lawsuit, and I think you said granted and denied in part.  
5 You granted in part because you said the history of her  
6 work history at Jeffrey Automotive was part of the work  
7 history background as far as the after acquired evidence  
8 and resume fraud, but I was not really clear -- and you  
9 also said --

10                   **THE COURT:** And source of distress.

11                   **MR. MIGLIO:** Right, and it would be  
12 admissible, including the fact that she was claiming  
13 mental and emotional distress in the lawsuit, but I really  
14 was not clear on what the denial was, unless it was just  
15 to say it's not admissible as litigiousness or and it is  
16 not admissible as to something else. I can't remember.

17                   **THE COURT:** Right. So the fact that she was  
18 terminated is obviously after this acquired issue. The  
19 filing of the lawsuit is --

20                   **MR. MIGLIO:** I think you said that it was  
21 admissible with a curvative instruction not to show that  
22 she litigious.

23                   **THE COURT:** Right. Maybe. So I think I  
24 might --

25                   **MR. MIGLIO:** We have a transcript.

1                   **MR. GRAHAM:** I mean, what I remember being  
2 was testimony about why she was terminated was not able --

3                   **THE COURT:** Right. That would be off base,  
4 and it would be granted with respect to that, unless  
5 circumstances developed during the trial that would  
6 justify its admission, but I just would expect no  
7 questions designed to elicit that, and if the filing of  
8 the lawsuit itself ends up coming in, I think I intended  
9 to indicate that I could fashion a curvative instruction  
10 with your help, of course. That would adequately deal  
11 with the wrong inferences that might be drawn from that,  
12 but as to whether she -- to elicit testimony that she  
13 filed the lawsuit, standing by itself I don't see why that  
14 is an admissible piece of evidence, but again, it depends  
15 on -- well, except that's where she claims distress.

16                   **MR. GRAHAM:** Would it be possible to make the  
17 same ruling that you had in other circumstances where if  
18 counsel was interested in presenting such information,  
19 they simply request clearance from you before introducing  
20 that?

21                   **THE COURT:** I think so. Again, I should make  
22 that decision based on the body of evidence that's been  
23 introduced at that time. I can see that there's relevance  
24 to the source of distress that she's experienced, and I  
25 can see that is, even with that relevance however, maybe

1 more prejudicial than probative, but I'll be in a much  
2 better position to evaluate that question when getting to  
3 her testimony, okay?

4 **MR. GRAHAM:** Thank you.

5 **MR. MIGLIO:** Thank you, your Honor.

6  
7 (Proceedings concluded.)

8 - - -  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C E R T I F I C A T I O N

I, Ronald A. DiBartolomeo, official court reporter for the United States District Court, Eastern District of Michigan, Southern Division, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript has been prepared by me or under my direction.

\_\_\_\_\_  
Ronald A. DiBartolomeo, CSR  
Official Court Reporter

\_\_\_\_\_  
Date

- - -